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Case No. A-362

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Philip E. Foster,

Petitioner

vs.

Rutgers, The State University,

et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

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21

QUESTIONS PRESENTED FOR REVIEW

1. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4 (j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i)?

2. Is the Third Circuit's decision as to when service is " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) correct in light of a decision by New Jersey's court of last resort?

3. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(ii) ?

4. Is the Third Circuit's decision as to when service is " made " within the meaning of F.R.C.P. 4(j) correct in light of a decision of this Court?

5. Is a decision of the Second Circuit holding service is " made " within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint or are decisions of the Third, Fourth, and District of Columbia Circuits holding that service of a summons and complaint is not "made " within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint, where service is attempted under F.R.C.P. 4(c)(2)(C)(ii), correct?

6. Did the Third Circuit apply the correct standards in determining whether the pleadings alleged " good cause " within the meaning of F.R.C.P. 4(j)?

7. Did the Third Circuit apply the correct standards in determining whether "reasonable inquiry " within the meaning of F.R.C.P. 11 had been shown?

LIST OF ALL PARTIES

Petitioner: Philip E. Foster

Respondent: Rutgers, the State University
The Rutgers Council of American Association of University Professors
The American Association of University Professors

TABLE OF CONTENTS

GROUNDS OF JURISDICTION

The date of entry of the Judgement Order sought to be reviewed is July 24, 1990.

A Petition for Rehearing of the Judgement Order was denied on August 21, 1990. By Order of Associate Justice David H. Souter, the time within which to file this Petition for Writ of Certiorari was extended to December 1, 1990.

The statutory provision believed to confer jurisdiction on the Court to review the Judgement Order is 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

F.R.C.P. 4(c)(2)(C)(i):

A summons and complaint may be served upon a defendant . . . pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of the State, or . . .

F.R.C.P. 4(c)(2)(c)(ii):

A summons and complaint may be served upon a defendant . . . by mailing a copy of the summons and complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service under this subdivision of this rule is received by

the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph . . .

F.R.C.P. 4(c)(2)(c)(A):

A summons and complaint shall, except as provided in subparagraph (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

F.R.C.P. 4(c)(2)(c)(B):

A summons and complaint shall, at the request pf the party seeking service . . . be served by a United States Marshall or deputy United States marshal, or by a person specially appointed by the court for that purpose . . .

F.R.C.P. 4(j):

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion, . . .

F.R.C.P. 11

Every pleading, motion, and other paper of a party represented by attorney shall be signed by at least one attorney of record . . . signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleadings, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for

any improper purpose, such as to harass or to cause unnecessary delay or needles increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . .

N.J. Ct. R. 4:4-4(a)(1):

Personal Service. Upon an individual other than an infant under 14 years of age or an incompetent person, by delivering a copy of the summons and complaint to him personally . . . or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on his behalf.

N.J. Ct. R. 4:4-4(a)(2):

Optional Mailed Service. In lieu of personal service prescribed by subparagraph (1), service may be made

by registered, certified or ordinary mail, which shall be effective only if the party answers or otherwise appears in response thereto. If defendant does not appear within 60 days following mailed service, service shall be made as is otherwise required by this rule, and the time prescribed by R. 4:4-1 for issuance of the summons shall then begin to run anew . . . .

N.J. Ct. R. 4:4-1:

The plaintiff, his attorney or the clerk of the court may issue the summons. If a summons is not issued within 10 days after the filing of the complaint the action may be dismissed in accordance with R, 4:37-2(a). Separate and additional summonses may issue against any defendants.

STATEMENT OF THE CASE

Jurisdiction in the court of first instance is predicated upon 28 U.S.C.A. 1331 AND 1337 with regard to Petitioner's claim under federal labor law, 29 U.S.C.A. 152 and 182, and upon 29 U.S.C.A. 1332 by virtue of diversity of citizenship and his claim under the Civil Rights Act, 42 U.S.C.A. 1981 et seq.

Although appearing pro se in this case, Petitioner is a member of bar of the State of New York.

In June, 1986, Rutgers, The State University, breached its promises to the Petitioner and refused wrongfully to renew his three year teaching contract. The Rutgers Council filed a grievance with the University. The University attempted to frustrate the processing of this grievance, so the Council challenged the University's conduct before a hearing panel. In appearing before the panel, the Council acted with

gross negligence and wholly failed to fairly and properly represent Petitioner. The panel. which included a senior employee of the University, decided in favor of the university, and Petitioner's grievance was dismissed. An additional grievance was filed in July, 1987, which was again wrongfully rejected by the university.

As the six-month period allotted under federal labor law to challenge the panel's decision began to expire, Petitioner filed a complaint in the district court for New Jersey on August 24, 1988.

On or about August 25, 1988, Petitioner wrote to the Council and its counsel informing them that an action had been commenced against the University in which they were a defendant and asked if the Council would accept service by mail in lieu of personal service. A similar request was made to the University at the same time. Counsel for the Council replied they were not authorized to accept service, the counsel replied that service could be made only in

forms permitted by court rules, and the University responded by agreeing to accept service by mail.

Shortly after September 9, Petitioner called the District Court Clerk's Office, explained that he was a pro se plaintiff and asked what type of service of the summons and complaint was permitted. The clerk informed him that he could make service by certified mail, return receipt requested. Petitioner further asked how long he had within which to make such service, and he was told that he had 120 days from the filing of the complaint. Petitioner noted down this information.

Sometime after mid-September, Petitioner went to a law library to verify whether certified mail service could be made and to see to whom such service should be addressed. He went to the volume of the U.S.C.A. for the federal rules of civil procedure and there found F.R.C.P. 4, located thereunder section (c) which dealt with how " A summons and complaint may be served . . ." and then found under sub-section (c)(2)(c)(i) a provision which indicated that a summons and

complaint may be served " pursuant to the law of the State in which the district court is held . . .". Petitioner then looked up New Jersey law, and found under N.J.Ct.R. 4:4-4 that service was in fact permitted by certified mail. Petitioner noted down that which he had ascertained in the law library.

Petitioner next consulted with an attorney specialized in cases such as his about adding parties and when such additions would have to be made. Petitioner also inquired whether service could be made under

the provisions of state law and was told that this was a permissible way to proceed. About this time Petitioner again called the Clerk's Office and in response to his questions was informed that a new summons would have to be issued and done so within 120 days of the filing of a complaint if new parties were added. Again, Petitioner noted this information in written form.

As the 120-day deadline approached, Petitioner prepared to serve the summons and complaint by certified mail. On December 19, three days before the deadline, Petitioner again called the Clerk's Office, explained that he was a pro se plaintiff about to serve a summons and complaint by certified mail, return receipt requested and asked if he should also file an affirmation of service with the court. The clerk said that he should. Petitioner then asked if he should also send a form 18-A with the summons and complaint in addition to filling the affirmation of service. The clerk said that he should. Petitioner made notes of the clerk's responses. Petitioner also asked what should be done about the disparity of time for response on the

form 18-A and that in the summons issued to Respondent American Association of University Professors, a non-New Jersey defendant; Petitioner recalls that he was told not to worry about it.

Petitioner then proceeded to type up an affirmation of service prepare the form 18-A. Petitioner then took the materials to a copy shop and there noticed for the first time that the form 18-A stated that service was being made pursuant to F.R.C.P. 4(c)(2)(C)(ii). As he had no idea at that time of the significance of this statement, Petitioner decided not to sign or date the form 18-A.

Petitioner then put a copy of the summons and complaint, together with the unsigned and undated form 18-A in an envelope for each of the Respondents, took the envelopes to the post office clerk who affixed the proper postage to each envelope, cancelled the postage with a December 19, 1988 postmark, stamped " CERTIFIED MAIL Return Receipt Requested " on the front of each envelope, and affixed the certified mail return receipt form to the

back of each. The clerk then put the envelopes in the mail.

Petitioner then mailed an affirmation of service stating that " a copy of the Summons and a copy of the Complaint herein were duly served on each of the present defendants herein on Dec. 19, 1988 " and sent this affirmation, duly signed, to the clerk's Office, where it was filed on December 23, 1988.

On December 21, 1988, a day before the deadline, a duly authorized person accepted service for Rutgers, the State University and for the Rutgers Council by signing the certified mail return receipt form. It is unknown when the American Association received the summons and complaint. Rutgers, the State University signed and returned a copy of the form 18-A allegedly on December 23, 1988, one day after the deadline.

Prior to January 6, 1989, Rutgers, The State University reviewed Petitioner's affirmation on file with the District Court Clerk's Office.

On January 9, 1989, Rutgers, the State University moved to dismiss Petitioner's complaint alleging untimely service under F.R.C.P. 4(c)(2)(C)(ii) as did the Rutgers Council and the American Association on January 18.

On February 10, 1988, a second copy of the summons and complaint were personally served on the Rutgers, The State University and the Rutgers Council pursuant to state law because neither had appeared or answered and the period by which Petitioner must make personal service under state law such circumstances was about to run.

On February 11, 1988, Petitioner cross-moved, inter alia, for sanctions under F.R.C.P. 11 for failure to make "reasonable inquiry " before the filing of Respondents motions.

On May 3, 1989, the District Court entered an Order granting Respondents' motions and denying Petitioner's cross-motions and filed an opinion setting out the reasons for its conclusions.

On January 16, 1990, the District Court filed a memorandum opinion concerning motions and cross-motions of the panel. which is not a respondent in this matter.

On July 24, 1990, the Third Circuit affirmed the judgement of the District Court without opinion.

It should be noted that on June 5, 1989, Petitioner filed a notice of appeal from the District Court's May 3, 1989 Order while waiting for his motions to alter or amend under F.R.C.P. 59(e) in order to preserve his right of appeal from the May 3 order. The District Court refused to decide the motions until the Third Circuit had decided an appeal purportedly taken on June 5 even though the District Court had the power to decide the motions. Venen v. Sweet, 758 F2d 117, 122 (3rd Cir. 1985). Only after the Third Circuit dismissed the purported appeal on October 30, 1989 did the District Court turn to Petitioner's motions, deciding them only on January 16, 1990, thereby considerably delaying proper consideration of his appeal by the Third Circuit. As a

consequence of these delays, not only has Petitioner arguably lost his federal labor law claim, which is governed by a six-month statute of limitations, Del Costello v. Teamsters, 462 U. S. 151 (1983), but also his diversity claims, Butler v. Sinn, 423 F2d 1116 (3rd Cir. 1970); Walsh v. Boss Linco Lines, 537 F. Supp. (D. N.J. 1981). On June 25, 1990, Petitioner filed a new complaint against respondents, but the claims in this complaint have all been dismissed by the District Court, except for that of wrongful interference against the Council, which is controlled by a six-year Statute of Limitations, holding that the other claims against Rutgers and against the Council are all without the statute of limitations.

ARGUMENT

In West v. Conrail, 481 U.S. 35, 39, n. 5 (1987), this Court was presented with, but determined that it then did not have to decide the question of when service is " made " under F.R.C.P. 4(j) (" Our holding that the statute of limitations was tolled when the complaint was filed eliminates the potential difficulty of determining the actual dates on which service of the complaint was made on the various defendants "). As discussed, and for the reasons given herein below, a grant of the writ sought in this petition would enable this Court to address this important procedural question.

1. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i)?

The District Court found that Petitioner " followed the proper procedure for mailing service " when he followed the directions of N.J.Ct.R. 4:4-4(a)(2) which directs that " service may be made by . . . certified . . . mail, which shall be effective only if the party served answers or otherwise appears in response thereto. If the defendant does not appear within 60 days following mailed service, service shall be made as is otherwise required by this rule, and the time prescribed by R. 4:4-1 for issuance of the summons shall then begin to run anew ". The District Court noted that " while Fed. R. Civ. P. 4(c)(2)(C)(i) permits the election of the state method for making service, it does not provide that the plaintiff will then be governed by all of the state rules for perfecting service ". The District Court then concluded, without elaboration: "Plaintiff is therefore still subject to Fed. R. Civ. P. 4(j), and did not meet that rule's provision for timely service." In so doing, the District Court assumed that the 120-day period of F.R.C.P. 4(j)

applies when service is attempted under F.R.C.P. 4(c)(2)(C)(i).

The legislative history of F.R.C.P. 4 indicates that F.R.C.P. 4(j) was not intended to apply where service is attempted by someone authorized to make service by state law. Prior to 1982, F.R.C.P. 4 provided on the one hand that " Service of process shall be made by a United Statcs Marshal " and on the other that " service of process
may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made ". Moore's Fed. Prac., Rule 4, §4.01(33.-2), at 43. In 1982, this Court proposed to change the provision regarding marshall service to authorized service of a summons and complaint by anyone not a party and not less than 18 years of age and limit service by marshals to where a request for such service was made. Id. The Advisory Committee indicated that the purpose of this change " is to relieve the burden on the United States Marshal

Service of serving civil process in private litigation". Id., at 45. The Judicial Conference indicated that " the proposed amendments are designed to relieve the United States Marshals of the duty of serving summonses and complaints in most civil actions ". Amendments to the Federal Rules of Civil Procedure, House Doc. 97-173, 97th Cong., 2nd Sess., April 29, 1982, Ap. A, at 5. The Department of Justice informed the House Judiciary Committee that such change was to " relieve effectively the United States Marshall Service of the duty of routinely serving summons and complaints . . . and would thus achieve a goal this Department has long sought ". 28 U.S.C.A. F.R.C.P 4, Pkt. Supp. 1989, 24. Congressman Edwards, who introduced the bill which enacted the change into law, also indicated the purpose of this change was "to alleviate the burden on the Marshal's Service ". Moore's Fed. Prac., Rule 4, §4.01(33.-2), at 49. Edwards further stated, when seeking a delay on the adoption of F.R.C.P. 4, that "Rule 4 does not currently provide a time limit on the service of process, largely

because United States marshalls are performing the service. With the changes . . . reducing the role of marshals, a new subsection (j) was added, requiring that service be made within 120 days of the filing of the complaint ". House Rep. 97-662, 97th Cong., 2nd Sess., July 23, 1982, 3. Thus, when adopting the 120-day period, Congress intended such provision to apply where the service made was that which previously would have had to have been made by a United States marshal, and not where such service could have been made by a person authorized to make service under state law. Since service was attempted in the instant case pursuant to F.R.C.P. 4(c)(2)(C)(i) which authorizes service " pursuant to the law of the State in which the district court is held" and such service was made by a person who would not have had to have service made by a United States marshal but rather a person authorized to serve process in the courts of the state in which the district court is held, the District Court erred in applying the 120-day period to the service attempted in this case. This Court has never

ruled on whether F.R.C.P 4(j) applies when service is attempted under F.R.C.P. 4(c)(2)(C)(i) by a person authorized to make such service by state law.

Assuming, arguendo, that F.R.C.P. 4(j)' s 120-day period applies to service attempted under F.R.C.P. 4(c)(2)(C)(i) where service is made by someone authorized to make such service under state law, the District Court also erred as a matter of law in concluding that the service attempted was not " made " within the meaning of F.R.C.P. 4(j) within the 120-day limit. The District Court found that "Plaintiff filed his complaint . . . on August 24, 1988 " and that " On December 19, 1988, plaintiff mailed process to defendants by certified mail . . . ", that is, three days before the 120-day period had ended. Nevertheless, the District Court concluded that such service did not meet the 120-day requirement. The District Court's conclusion must have
assumed that when service is attempted under F.R.C.P. 4(c)(2)(C)(i) it is not " made " within the meaning of F.R.C.P. 4(j) when the summons and

complaint are mailed. The District Court also did not specify whether the determination of when service is " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) is a matter of federal or of state law.

If the determination of when service is " made " within the meaning of 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) is a matter of federal law (see the comment by a member of the Supreme Court Advisory Committee suggesting that consideration of the effect of failure to promptly effect service be deferred to consideration of whether an action should be dismissed when formulating the original of F.R.C.P. 4 in 1938), then it appears that a federal question claim such as that raised here under 29 U.S.C.A. 152 and 182 would be governed by federal law whereas a diversity claim such as that raised here under 28 U.S.C.A. 1332 and 42 U.S.C.A. 1981 et seq. would be governed by state law since F.R.C.P. 4(j) does not address the question of when service is " made ", New Jersey's service requirements are an integral part of its statute

of limitations, and failure to apply New Jersey's service requirements would, if federal precedents were not applied, result in discrimination against a non-citizen plaintiff, see Walker v. Armco, 446 U.S. 740 (1980) and the cases decided thereunder. Alternatively, the determination of when service is " made " when service is attempted under F.R.C.P. 4(c) (2)(C)(i) may be a matter solely of state law. See the comments of members of the original Supreme Court Advisory Committee on the predecessor to F.R.C.P. 4(c)(2)(C)(i) in Proceedings of the Institute at Washington, D.C., 1938, 113, 239 and Proceedings of the Institute on Federal Rules, Rules of Civil Procedure for the District Courts of the United States, 1938, 205, 212. This Court has never addressed these threshold questions.

The legislative history of F.R.C.P. 4(j) indicates that Congress intended to address the question of when service was " made " within the meaning of F.R.C.P. 4(j). Congressman Edwards, in seeking to delay adoption of the original bill, stated: "The

Committee has received complaints about ambiguities in new subsection (j) . . . The Committee on Federal Courts of the New York State Bar Association . . . also points out that the proposed amendment is ambiguous in dealing with the situation where service is timely but defective through no fault of the party. New subsection (j) requires dismissal of the action if service was not " made " within 120 days. Whether service in this instance was " made " within 120 days. Whether service in this instance was " made " within the meaning of subsection (j) is not clear from the text of the subsection or the advisory notes to the subsection ". House Rep. 97-662, 97th Cong., 2nd Sess., July 23, 1982, 3-4. The " ambiguities " were never clarified, as numerous cases, including the instant case, testify. This Court, however, has never passed on the question of when service is " made " within the meaning of F.R.C.P. 4(j). For reasons mentioned in 2 and 4 below, Petitioner maintains that service is " made " within the meaning of F.R.C.P. 4(j) when attempted under F.R.C.P. 4(c)(2)(C)(i) when the summons and

complaint are mailed. As the District Court found that the summons and complaint in this case were mailed within the 120-day period, but nevertheless held such service untimely, the District Court erred as a matter of law on this issue.

In addition, assuming, arguendo, that service is " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i) not upon the mailing of the summons and complaint, but rather upon the receipt thereof, the District Court further erred as a matter of law in holding such service as made under F.R.C.P. 4(c)(2)(C)(i) untimely as to respondent Rutgers, the State University. The District Court noted that " On December 23, 1988, Rutgers returned Form 18-A ", but it made no finding as to when Rutgers had received the summons and complaint. Petitioner submitted a certified mail return receipt form signed by an authorized agent for Rutgers on December 21, 1988, A-54. Rutgers submitted an affidavit stating only that on December 23, 1988, it signed form 18-A " which had been enclosed with the

summons and complaint ", A-59; it offered no evidence on the date on which it had received the summons and complaint. If, therefore, the service attempted upon Rutgers pursuant to F.R.C.P. 4(c)(2)(C)(i) is " made " within the meaning of F.R.C.P. 4(j) not when mailed, but when received, whether such service was timely would either depend upon which party has the burden of proof, a question on which this Court has not spoken, or else must be said to have to be decided in favor of the Petitioner. The Third Circuit has held that the burden of proving that service is untimely rests upon the moving party, here the Respondents. See Rosen v.Solomon, 374 F. Supp. 915 (E.D.Pa. 1974), aff'd. 423 F2d 1051 (3rd Cir. 1975).

Since most civil litigation in the Federal courts is commenced by the service of a summons and complaint, and many suits are no doubt commenced by service of a summons and complaint pursuant to F.R.C.P. 4(c)(2)(C)(i), consideration by this Court of what law governs the determination of when such service is " made " within the meaning of F.R.C.P. 4(j),

of when such service is " made ", whether or not F.R.C.P. 4(j) applies when such service is made by someone authorized to make such service under state law, and who should bear the burden of proving untimeliness of service are important questions of Federal law which, except for the issue of burden of proof, have been decided by the Third Circuit in the instant case, but which should be settled by this Court. See Schlagenhauf v. Holder, 379 U.S. 104 (1964) (certiorari granted " to review undecided questions concerning the validity and construction of Rule 35 " of the Federal Rules of Civil Procedure, id. at 109); Societe Int'l. v. Rogers, 357 U.S. 197 (1957) (certiorari granted because decision below " raised important questions as to the proper application of the Federal Rules of Civil Procedures ").

2. Is the Third Circuit's decision as to when service is " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i) correct in light of a decision by New Jersey's court of last resort?

As noted above, the determination of when service is " made " within the meaning of F.R.C.P. 4 (j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) may be a question of state law. If the determination is a matter of state law, then the District Court erred as a matter of law in failing to follow the authority of New Jersey's court of last resort.

Prior to the present rule in New Jersey which permits service by mail, N.J.Ct.R. 4: 4-4(a)(2), service was made by delivery of the summons to the defendant by a sheriff. The question occasionally arose whether such service was complete for statute of limitations purposes when issued to the sheriff or when actually delivered by the sheriff to the defendant. In County v. Pacific Coast Borax Co., 67 N.J.L. 48, 50 A. 906 (Sup.

Ct. 1902), aff'd 68 N.J.L. 273, 53 A. 386 (Ct. E. & A. 1902), the summons was given to the sheriff within the statute of limitations, but was not delivered by him until after the statute had run. New Jersey's court of last resort held that delivery of the summons to the sheriff, not delivery of the summons by the sheriff to the defendant, determined when services was made for purposes of the statute of limitations. Since service by the sheriff has been replaced under New Jersey law with service by mail, service by mail should be deemed complete upon mailing of the summons and complaint by the defendant. In a more recent decision, New Jersey's highest court dismissed a complaint because two years had elapsed between teste and delivery of the summons and complaint to the sheriff for service upon the defendant. Court Inv. Co. v. Perillo, 48 N.J. 334, 225 A.2d 352 (N.J. 1966). Had the District Court adhered to the authority in County v. Pacific Coast Borax Co., it would not have held service in the instant case to have been untimely under F.R.C.P. 4(j).

Since the Third Circuit has decided a federal question in a way in conflict with a state court of last resort, this Court ought to grant this petition for a writ of certiorari. See Minnick v. Gardner, 292 U.S. 48 (1933) (reversal of Third Circuit affirmance of order denying preference to a lien on a fund resulting from sale of goods by debtor's trustee in bankruptcy for failure to follow Pennsylvania decision law).

3. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(ii)?

F.R.C.P. 4(c)(2)(C)(ii) differs significantly from F.R.C.P. 4(c)(2)(C)(i). F.R.C.P. 4(c)(2)(C)(ii) specifies that after mailing a copy of the summons and complaint, together with two copies of a notice and acknowledgement conforming substantially to form 18-A, if " no acknowledgement of service . . . is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made "

by personal service or by other authorized means. Although the District Court noted correctly that " Fed. R. Civ. P. 4(j) provides that service of process must be made within 120 days following filing the summons and complaint " it concluded on the basis of prior Third Circuit decisions that " in this circuit, the individual making the complaint must mail service and receive the form from defendant within 120 days of filing the complaint " (emphasis in original). As there is no basis for this judicial gloss on F.R.C.P. 4(j), the District Court erred as a matter of law in determining that service is not " made " within the meaning of F.R.C.P. 4(j) until the plaintiff has received a form of acknowledgement from the defendant. It should be noted at the outset that Petitioner has never claimed that he attempted service under F.R.C.P. 4(c)(2)(C)(ii). Rather, Respondents claimed that Petitioner had attempted service under F.R.C.P. 4(c)(2)(C)(ii) and then argued that such service was untimely under F.R.C.P. 4(j). It was solely on the basis of Respondents' claim that the District Court found

service attempted under F.R.C.P. 4(c)(2)(C)(ii) to be untimely under F.R.C.P. 4(j).

Assuming, arguendo, that Petitioner attempted service under F.R.C.P. 4(c)(2)(C)(ii), such service was nevertheless timely. In 1982, this Court proposed a new provision which would authorized service " by registered or certified mail, return receipt requested and delivery restricted to the addressee ". Moore's Fed. Prac., Rule 4, " 4.01(33.-2), at 44. This Court also proposed that if service was to be made pursuant to this new provision, that " service shall be deemed to have been made . . . as of the date on which the process was accepted, refused or returned as unclaimed ". Id. Congress, however, decided to eliminate this Court's proposed provision, and to replace it with one which, in the words of Congressman Edwards, "provides for a system of service by mail similar to the system now used in California. See Cal. Civ. Pro. § 415.30 (West 1973). Service would be by ordinary mail with a notice and acknowledgement of receipt form enclosed ". Id. Although Congress modeled F.R.C.P.. 4(c)(2)(C)(ii)

on California Code §415.30, it chose not to follow the Code's provision that " Service of summons pursuant to this section is deemed complete on the date a written acknowledgement of receipt of summons is executed, if such acknowledgement thereafter is returned to sender ". Id. § 415.30(c). Since Congress rejected this Court's proposal that service made when the process was accepted, refused or returned unclaimed, and did not adopt California's provision which would deem service made upon execution of the acknowledgement, it would appear that Congress intended service to be " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(ii) upon the mailing of the summons and complaint. As noted in 5 below, this is the conclusion reached by the Second Circuit.

The instant case also raises a number of matters auxiliary to when service is " made " within the meaning of F.R.C.P. 4(j) where attempted under F.R.C.P. 4(c)(2)(C)(ii). Petitioner argued below that service was " made " within the meaning of F.R.C.P.

4(j) upon Respondent Rutgers, the State University and the Rutgers Council by virtue of their actual knowledge of the suit against them as a result of letters between Petitioner and Rutgers, The State University, A-44, 45, and extensive contact and letters between the Petitioner and Rutgers Council, e.g., A-27-29, 4748, all within 120 days of the filing of the complaint. Petitioner also argued below that if service is not " made " within the meaning of 4(j) until such service is acknowledged, that the service attempted was timely by virtue of the certified mail return receipts signed by agents of the Respondents Rutgers, the State University and The Rutgers Council on December 21, 1988, A- 54, 55. Petitioner further argued below that Respondents Rutgers is estopped from asserting a claim of untimeliness because it had waived its right to personal service under F.R.C.P. 4(A) where the sender does not receive an acknowledgement within 20 days of mailing the summons and complaint by virtue of its agreement to accept service by mail, A-45. Lastly, Petitioner argued below that service attempted under

F.R.C.P. 4(c)(2)(C)(ii) is timely if timely under F.R.C.P. 4(c)(2)(C)(i). The court below refuses to address any of these arguments.

Since most civil litigation in the Federal courts is commenced by the service of a summons and complaint, and most are no doubt commenced by service of a summons and complaint pursuant to F.R.C.P. 4(c)(2)(C)(ii), consideration by this Court of when such service is " made " within the meaning of F.R.C.P. 4(j) and perhaps the other, related questions raised by Petitioner below, are important questions of federal law which have been decided by the Third Circuit in the instant case, but which should be settled by this Court. See Schlagenhauf v. Holder, 370 U.S. 10 (1964); Societe Int'l. v. Rogers, (1957), discussed supra. To date, this Court has never addressed the question of when service is " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(ii). Until this question is answered, doubt will remain as to when service must be " made ", or whether service has been " made ", for

such service to be timely under F.R.C.P. 4(j). Decisions of the Courts of Appeals on this question are considered in 5 below.

4. Is the Third Circuit's decision as to when service is " made " within the meaning of F.R.C.P. 4(j) correct in light of a decision of this Court.

Prior to the 1982 enactments authorizing service by mail under Federal law, service of a summons and complaint had to be made by a United States marshal. The situation occasionally arose where the delivery to the marshal was within the statute of limitations, but delivery to the defendant was without the statute, see, e.g. Maier v. Independent Taxi Owners Ass'n., 96 F.2d 579 (Ct.App. D.C 1938) (refusal to dismiss where declaration delivered to marshall on the last day the action could begin under the statute of limitations), Equitable Assurance Co. v. Schwartz, 42 F2d 646 (5th Cir. 1930) (refusal to dismiss where " the bill was filed

and the process issued within the contestable period "), and U.S. v. Northern Finance Corp., 16 F.2d 999 (2nd Cir. 1927) (Judge Hand stating that " it is the usual rule that the issuance of the subpoena, after bill filed, and the lodgement of it for service in the sheriff's hands, tolls the statute " id., at 999). Such a case presented itself before this Court in Linn & Lane Timber Co. v. U.S., 236 U.S. 574 (1915). Justice Holmes, writing for this Court, stated that a suit should not be dismissed for being without the statute of limitations where " the bills were filed and subpoenas were taken out and delivered to the marshal for service " before the statute had run. Id., at 578. If the District Court had followed the Court's decision in Linn & Lane Timber Co. it should not have dismissed Petitioner's complaint for failure to comply with the requirements of F.R.C.P. 4(j) where service was deemed attempted under F.R.C.P. 4(c)(2)(C)(ii) or, for that matter, where service was made under F.R.C.P. 4(c)(2)(C)(i) if when such service was " made " is a matter of Federal law (see 1 above). The Third

circuit's affirmance of the District Court's decision has decided a federal question in a way that conflicts with an applicable decision of this Court. Under such circumstances, certiorari may be granted. See U.S. v. Rands, 389 U.S. 121 (1967) (certiorari granted " because of a seeming conflict between the decision below and " a prior decision of this Court, id. at 122).

5. Is a decision of the Second Circuit holding service is " made " within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint or are decisions

of the Third, Fourth, and District of Columbia Circuits holding that service of a summons and complaint is not " made " within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint, where service is attempted under F.R.C.P. 4(c)(2)(C)(ii), correct?

Since Congress did not specify when service is " made " within the meaning of F.R.C.P. 4(j) and most civil litigation in the Federal courts is commenced by service of a summons and complaint under F.R.C.P. 4(c)(2)(C)(ii), numerous cases have arisen where the Federal courts have had to determine when service is " made " within the meaning of F.R.C.P. 4(j). In the majority of such cases, the question presented to the courts was whether or not service was " made " when the summons and complaint were mailed, or whether service was not " made " until the acknowledgement had been returned to and received by the sender.

The Second Circuit, in Morse v. Elmira Country Club, 752 F2d 35, 39 (2nd Cir. 1984) concluded

largely on the basis of Congress's " intentional " omission of a provision similar to California Code § 415.30(c), that service was " made " when the summons and complaint were mailed; return of the acknowledgement to the sender was not determinative of when service was " made " but rather served only as evidence that service had been made. The Third Circuit, in the instant case, Foster v. Rutgers, The State University et al., 909 F2d 1476 (3rd Cir. 1990) and in a prior case, relied on by the District Court below, Green v. Humphrey Elevator and Truck Co., 816 F2d 877 (3rd Cir. 1987), the Fourth Circuit in Armco v. Penrodstatler Bld. System, Inc., 733 F2d 1087 (4th Cir. 1984), and the District of Columbia Circuit in Combs v. Nick Garrison Trucking, 825 F2d 437 (D.C.Cir. 1987) (discussing the split in the Circuits), have held that service is not " made " within the meaning of F.R.C.P. 4(j) until the sender has received the executed and returned copy of the acknowledgement. The position of these Circuits rests principally on a comment by Congressman Edwards,

made when explaining the mechanics of F.R.C.P. 4(c)(2)(C)(ii), and not when addressing service under F.R.C.P. 4(j), that " If the defendant returns the acknowledgement form to the sender within 20 days of mailing, the sender files the return and service is complete ", Moor's Fed. Prac., Rule 4, PAR. 4.0L(33.-2), at 44. The principal difficulty with the position of the Third, Fourth, and District of Columbia Circuits is that the timeliness of service under their view is taken out of the hands of the plaintiff and put in those of the defendant. For reasons such as this, the New York Bar Association has recommended that the Second Circuit's view be enacted into law by statute. 116 F.R.D. 179.

A serious consequence of the Third, Fourth and District of Columbia Circuits is worth noting. Although the plaintiff may mail the summons and complaint within the statute of limitations, if the defendant defeats such service by failing to return the acknowledgement within 120-days, the plaintiff may be time-barred from bringing his claims again. This

appears to have happened in the instant case, and has happened in prior cases. For this reason, service under F.R.C.P. 4(c)(2)(C)(ii) has become in some Circuits, as one commentator put it, " a trap for the unwary ".

Since the decision by the Third Circuit in the instant case conflicts with the decision of the Second Circuit in Morse v. Elmira Country Club on the important matter of when service is " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(ii), this petition for a writ of certiorari should be granted. See U.S. v. Schaeffer Brewing Co., 356 U.S. 227, 230 (1957) (certiorari granted where question presented was when the time commenced within which an appeal must be " taken " within the meaning of F.R.C.P. 73(a) because of conflict between Circuits and public importance of the proper interpretation and uniform application of the provisions of the Federal Rules). See also Nat'l. Ass'n. of Greeting Card Publishers v. UPS, 412 U.S. 810, 820 (1983) (certiorari granted " because of

inconsistencies in the holdings " in two Circuits construing provisions of the Postal Reorganization Act).

6. Did the Third Circuit apply the correct standards in determining whether the pleadings alleged " good cause " within the meaning of F.R.C.P. 4(j)?

The District Court did not apply the correct standards in determining whether " good cause " had been shown within the meaning of F.R.C.P. 4(j) in two ways: (1) it did not apply the correct standard in reading the allegations of the pleadings; and (2) it did not apply the correct standard in determining whether the the allegations as read constitute " good cause " within the meaning of F.R.C.P. 4(j)

Petitioner alleged, inter alia, that he was told by the Clerk's Office shortly after filing the complaint that he " had 120 days from the filing of the complaint" in which to make service, and he noted this down at the

time, and that he had been told that he could make such service by certified mail. Petitioner alleged that he then went to a law library where he found F.R.C.P. 4(c)(2)(C)(i) which authorized service pursuant to state law, and then found N.J.Ct.R. 4:4-4 which provided that in fact service could be made by certified mail, and noted such information down. Petitioner alleged that he then consulted with an attorney specialized in the substantive matters which this case raises, asked him also about procedural matters, and noted down his comments. Petitioner alleged that he again telephoned the Clerk's Office and was informed that were he to add new parties that service would have to be made " within 120 days of the filing of the complaint " and noted down such information on the sheet that he had taken to the library. Petitioner further alleged that on the day of intended mailing, three days before the 120-day deadline, he again called the Clerk's Office and was told that he should include a copy of form 18-a even though service was to be made by certified mail, return receipt, and noted down

such information. The foregoing allegations are each material to whether or not Petitioner had alleged " good cause ", but the District Court found only that Petitioner " does state several times in his papers that he researched the federal law regarding service of process ". The District Court ignored the allegations that Petitioner had been told by the Clerk's Office simply that he had 120 days within which to make service, that he researched state law and intended to make service under F.R.C.P. 4(c)(2)(C)(i), that he included a copy of form 18-A in his mailing solely on the advice of the clerk's Office, that he had consulted with an attorney on procedural matters, and over-looked the fact that F.R.C.P. on its face simply requires that service be " made " within 120 days. The District Court can not be said to have read Petitioner's allegations most favorably to the non-moving party as indeed it ought to have done under the Third Circuit's own rules, see, e.g., Sturm v. Clark, 835 F2d 1009 (3rd Cir. 1987); D.P. Enterprises v. Bucks Cty., 752 F2d 943 (3rd Cir. 1984). It would appear that most Circuits are

in agreement that in motions to dismiss, the pleadings are to be read in a light most favorable to the non-moving party, but this Court has never addressed this important question.

The District Court held that Petitioner had not shown " good cause " within the meaning of F.R.C.P. 4(j) because Petitioner had not exercised " diligence " in making service, that Petitioner had not been " thorough ". In the absence of crediting properly Petitioner's allegations, the District Court could easily conclude that Petitioner had not been " thorough " but there is no basis in using " diligence " as the standard by which " good cause " is to be measured.

When enacting F.R.C.P. 4(j) Congress was particularly concerned that a plaintiff not be prejudiced for failure to comply with the 120-day deadline. When enacting the provision, Congress noted that " Where plaintiff has made a reasonable effort to serve defendant, Congress intended that the 120-day deadline be extended ". 1982 U.S. Code Cong. & Ad. News, 4434, 4442. In applying a " diligence "

and thoroughness " test, the District Court contravened Congressional intent, and added a burden to the Petitioner's shoulders which Congress had not intended.

In affirming the District Court's decision, the Third Circuit has applied a standard to the reading of allegations which is entirely unfair to the non-moving party to a motion to dismiss and adopted an interpretation of " good cause " contrary to that intended by Congress. In so doing, it has decided important questions of Federal law which have not been, but which should be settled by this Court. For this reason, this petition should be granted. See, e.g. Schlagenhauf v. Holder, 379 U.S. 104 (1964), discussed supra.

7. Did the Third Circuit apply the correct standards in determining whether " reasonable inquiry " within the meaning of F.R.C.P. 11 had been shown?

F.R.C.P. 11 provides for mandatory sanctions if a brief or paper is signed without " reasonable inquiry " that it is well grounded in fact and warranted by law. After receiving a letter indicating that Petitioner was requesting permission to make service by mail, Respondents received an envelope, clearly marked certified mail, inside of which was to be found a complaint indicating that Petitioner was proceeding pro se and a summons, also stating that Petitioner was proceeding pro se, and indicating what the respondent must do, when it must be done, and what would happen if it was not done. In addition, there was also an unsigned and undated form 18-A. Shortly thereafter, Rutgers, The State University, examined that District Court file, and found there an Affirmation of Service, signed by Petitioner, and stating that only a summons and complaint had been mailed to the respondents on December 19, 1990; the Affirmation also indicated that Petitioner was proceeding without counsel. Rutgers, The State

University then communicated this knowledge to counsel for the other Respondents and to its own counsel. Service by certified mail is authorized only under F.R.C.P. 4(c)(2)(C)(i) and is not authorized under F.R.C.P. 4(c)(2)(C)(ii). The form 18-A was neither signed nor dated, as required by F.R.C.P. 4(c)(2)(C)(ii), nor did the envelope contain, as further required by F.R.C.P. 4(c)(2)(C)(ii), a second copy of form 18-A nor a return prepaid envelope addressed to the sender. Petitioner did not return the copy of form 18-A which it received from Rutgers, The State University as he ought to have done if he was proceeding under F.R.C.P. 4(c)(2)(C)(ii).

Despite the foregoing, Respondents made no inquiry as to whether service had been made under F.R.C.P. 4(c)(2)(C)(i), but rather moved for dismissal under F.R.C.P. 4(j) alleging solely that service had been made under F.R.C.P. 4(c)(2)(C)(ii) and that service was therefore untimely.

Subsequent to receiving Respondent's motion papers, but prior to the return date of their motions,

Petitioner served Rutgers, The State University and The Rutgers Council personally, as required under F.R.C.P. 4(c)(2)(C)(i) and N.J.Ct.R 4:4-4 where the defendant does not answer or otherwise appear. None of the Respondents mention receipt of personal service in their papers submitted to the District Court prior to the return date although such service was effected three weeks before such date.

The District court dismissed Petitioner's complaint principally on the ground that he had not complied with the requirements of F.R.C.P. 4(c)(2)(C)(ii) and only considered service under F.R.C.P. 4(c)(2)(C)(i) because Petitioner had not signed the form 18-A.

The circumstances here, prior to the Respondents' motions, were such that Respondents should have asked Petitioner if he had intended service under F.R.C.P. 4(c)(2)(C)(ii). As a leading commentator has stated," If state law . . . also authorizes mail service . . . a defendant may become confused about his responsive steps . . . The

counselling point to the defendant's lawyer is to check the point out with the Plaintiff's attorney. It shouldn't be a hard one to work out, unless the defendant is deliberately trying to maneuver the plaintiff out of time . . . 1985 Practice Commentary to Rule 4, Pkt. Sup. to 28 U.S.C.A. Federal Rules of Civil Procedure Rules 1-11 Par. C4-20, at 101-102. If Respondents are successful in the instant case, they will indeed have maneuvered the plaintiff in this case out of time.

The District Court denied Petitioner's cross-motion for sanctions under F.R.C.P. 11 by looking to the conduct of the Petitioner rather than that of the Respondents. The District Court denied Petitioner's cross-motion on the grounds that " plaintiff cannot assert his own deficiency regarding method of service " in making a claim under F.R.C.P. 11. The District Court should have evaluated Respondent's actions not those of the Petitioner to determine if Respondents had made " reasonable inquiry ". In affirming the District Court's decision, the Third Circuit has applied an incorrect standard in

determining whether sanctions should be levied under F.R.C.P. 11. The proper standard for sanctions under F.R.C.P. 11 is an important question of federal law which has not been, but which should be, settled by this Court.

For the foregoing reasons, Petitioner requests that a writ of certiorari to the Third Circuit be granted.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5117

PHILIP E. FOSTER

Appellant

v.

RUTGERS, THE STATE UNIVERSITY; THE RUTGERS COUNCIL OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE PERMANENT PANEL ON PROCEDURES; and THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, Joint and Several

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Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-03692)
District Judge: Honorable H. Lee Sarokin

Submitted Under Third Circuit Rule 12(6)

July 2, 1990

Before: MANSMANN, COWEN AND WEIS, Circuit Judges.

JUDGEMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

Attest:

Sally Mrvos, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PHILIP E. FOSTER,

Plaintiff,

Civil Action No. 88-3692

v.

RUTGERS, THE STATE UNIVERSITY; THE RUTGERS COUNCIL OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE PERMANENT PANEL ON PROCEDURES:

AND THE AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS,

: OPINION

Joint and Several
Defendants.

SAROKIN, District Judge.

In this wrongful termination action, defendants Rutgers, the State University (Rutgers), the Rutgers Council of the American Association of University Professors Chapters (Council), and the American Association of University Professors (AAUP) now move for dismissal pursuant to Fed. R. Civ. P. 4(j) for failure to make timely service of process. Plaintiff makes several cross-motions.

BACKGROUND

Plaintiff Philip E. Foster was employed as an adjunct professor by defendant Rutgers from 1984 until 1987 when Rutgers failed to renew its three-year agreement with plaintiff. Contending that Rutgers' failure to renew the agreement was wrongful, plaintiff filed a complaint against Rutgers in this court. He joined as defendants the Council, the Permanent Panel on Procedures, and the AAUP.

Plaintiff filed his complaint with the District Court of New Jersey on August 24, 1988. On December 19, 1988, plaintiff mailed process to defendants by certified mail and enclosed Form 18-A, a form required by Fed. R. Civ. P. 4(c)(2)(C)(ii). On December 23, 1988, Rutgers returned Form 18-A. The Council and AAUP also accepted service on this date.

DISCUSSION

TIMELINESS OF SERVICE UNDER FEDERAL RULES

Fed. R. Civ. P. 4(j) provides that service of process must be made within 120 days following filing the summons and complaint. Both Rutgers and the Council state that because they received the mailing on December 23, 1988, service was made on defendants no earlier than 121 days after plaintiff filed his complaint.

Under Third Circuit law, service of process under Fed. R. Civ. P. 4(c)(2)(C)(ii), the rule which allows for service by mail, is complete when the defendant signs and returns form 18-A. Stranahan Gear Co. v. NL Industries, Inc., 800 F.2d 53, 56-57 (3d Cir. 1986); Green v. Humphrey Elevator and Truck Co. and Maintenance Co., 816 F.2d 877, 881 (3d Cir. 1987); Braxton v. United States, 817 F.2d 238, 240 note 1 (3d Cir. 1987). Therefore, in this circuit, the individual making the complaint must mail process and

receive the form from defendant within 120 days of filing the complaint. ill)

Absent a showing of good cause or excusable neglect for failure to complete service, dismissal of a complaint is mandatory if the plaintiff fails to meet the timeliness provision of Fed. R. Civ. P. 4(j). Braxton, 817 F.2d at 240; Lovelace v. Acme Markets, 820 F2d 81, 84 (3d Cir. 1987). Plaintiff claims that he has shown "good cause" for failing to serve process on time. He states that he has met the six-part test set forth in Dominic v. Hess Oil V.I. Corp., 841 F.2d 513 (3d Cir. 1988). In that case, the court found no lack of diligence or inadvertence by counsel that would prevent the court from extending the time period in which plaintiff could serve process. 841 F.2d at 516-17, citing Consolidated Freightways Corp. of Del. v. Larson , 827 F.2d 916 (3d Cir. 1987) and Coady v. Aguadilla Terminal, Inc., 456 F.2d 677 (1st Cir. 1972). Plaintiff here reminds the court on several occasions that he is not represented by counsel, that he is not a litigator, and that he is not admitted to practice law in New

Jersey. However, he is an attorney licensed to practice in New York, and he does state several times in his papers that he researched the federal law regarding service of process. Had he performed such research with diligence, he would have been well aware that service would not be complete until defendants returned Form 18-A, and that he should have mailed process to defendants substantially earlier in order to complete service before the end of 120 days. Had his research been thorough, plaintiff could have readily foreseen the consequences, and contrary to his statement, he did not make substantial good faith efforts towards compliance with the federal rules.

SERVICE OF PROCESS UNDER STATE RULES

Plaintiff asserts that, if service was not timely under federal rules, in the alternative his service can be considered made under state rules. Fed. R. Civ. P. (4)(c)(2)(C)(i) states that service may be made "pursuant to the law of the State in which the district

court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State."

Defendants argue that plaintiff's service cannot be considered under state rules, since he enclosed federal form 18-A with his papers. Under Kress v. Scott Instruments, 116 F.R.D. 631 (W.D. Pa. 1987), "[O]nce plaintiff has chosen between state methods of service permitted by Rule 4(c)(2)(C)(i) and the method prescribed by Rule 4(c)(2)(C)(ii), [he/she] is bound to complete service in accord with the section [he/she] has chosen." 116 F.R.D. at 632, citing Billy v. Ashland Oil, Inc., 102 F.R.D. 230 (W.D. Pa. 1984). Because plaintiff mailed process via certified mail rather than by regular mail as prescribed by Rule 4(c)(2(C)(ii), and because plaintiff did not sign form 18-A as is required by the form, the court will consider whether or not service is proper under state rules.

New Jersey Ct. R. 4:4-4(a)(2)[1] directs that a party may mail service "by registered, certified or ordinary mail[.]" Plaintiff, therefore, followed the proper procedure for mailing service. However, while Fed. R. Civ. P. 4(c)(2)(C)(i) permits the election of the state method for making service, it does not provide that the plaintiff will then be governed by all of the state rules for perfecting service. Plaintiff is therefore still subject to Fed. R. Civ. P, 4(j), and did not meet that rule's provision for timely service.

The court concludes that plaintiff failed to meet the timeliness requirement of Fed. R. Civ. P. 4(j) and that no good cause has been shown to excuse compliance. Therefore, the court will dismiss plaintiff's complaint without prejudice.

PLAINTIFF'S CROSS-MOTIONS

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[1] New Jersey Ct. R. 4:4(c)(1) is the rule which applies to method of service on corporations, partnerships, and agencies. That rule, however, state that a corporation, partnership, or agency may be served by mail in accordance with Rule 4:4-4(a), which governs service on individuals.

1. Declaring Form 18-A Null and Void

Plaintiff asks this court to declare his use of Form 18-A null and void. However, doing so would not prevent a dismissal of plaintiff's complaint since, as was discussed above, plaintiff failed to meet the federal requirement for timely service of process irrespective of whether he was attempting to serve under federal or state rules.

2. Evidentiary Hearing to Determine Evasion of Service of Process

Plaintiff asks that the court hold an evidentiary hearing in order to determine whether or not defendants are attempting to evade accepting plaintiff's service of process. However, there are no disputed facts which would warrant such a hearing. Plaintiff does state that Rutgers had the opportunity to thwart service if it actually received plaintiff's mailing on December 21 or 22, yet did not sign and return

Form 18-A until December 23. However, plaintiff failed to take into account that the defendants, under Rule 4(c)(2)(C)(ii), were entitled to have twenty days in which to return the form and complete service of process, and that plaintiff should have taken the needed twenty extra days into account in deciding whether or not and when to mail the papers. Green, 816 F.2d at 883, quoting Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure, 96 F.R.D. 81, 113-14 (1983). The court finds no need for an evidentiary hearing, and denies plaintiff's request.

3. Deferring Decision on AAUP Motion

Plaintiff states that because the receipt which would prove the date on which AAUP and the Council received service is not available, this court should defer a decision on AAUP's motion for dismissal until the date can be ascertained. However, as was stated above, the date is irrelevant since the plaintiff did not

mail process in time to afford the defendants the twenty days

needed to return Form 18-A. There is no reason to defer decision on AAUP's motion.

4. Enlargement of Time in Which to Serve Process

Plaintiff claims that because his enclosed Form 18-A was not signed, defendants are not within their rights in moving for dismissal. However, plaintiff cannot assert his own deficiency regarding his method of service, especially in light of the fact that plaintiff's service was untimely whether he was following the service procedures under federal or state rules. The court denies plaintiff's cross-motion for sanctions.

Defendants' motions for dismissal will be granted for plaintiff's failure to meet the Rule 4(j) requirement that service of process be completed within 120 days of filing the complaint. This dismissal is without prejudice; plaintiff may file his complaint again and attempt to serve process on defendants. If he does so in a timely fashion, and if any defendant

fails to return Form 18-A within the required twenty days, that defendant will bear costs of personal service.

Plaintiff's cross-motions are denied.

CONCLUSION

Defendants' motion to dismiss for failure to make timely service of process is granted, and the complaint will be dismissed without prejudice. Plaintiff's cross-motions are denied.

H. LEE SAROKIN,
U.S.D.J.

Date: May 3, 1989

Original to Clerk, U.S. District Court

Copy to: Hon. Ronald J. Hedges, U.S. Magistrate

Mr. Philip Foster
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PHILIP E. FOSTER,

Plaintiff,

Civil Action No. 88-3692

v.

RUTGERS, THE STATE UNIVERSITY; THE RUTGERS COUNCIL OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE PERMANENT PANEL ON PROCEDURES; AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

ORDER

:

Defendants.

This matter having been opened to the court on the motion of defendants Rutgers, the State University, the Rutgers Council of the American Association of University Professors, for dismissal pursuant to Fed. R. Civ. P. 4(j) for failure to make timely service of process and on the cross-motions of plaintiff; and the court having read and considered the papers submitted by the parties; and for the reasons expressed in the accompanying opinion,

IT IS this 3, day of May, 1989, hereby ORDERED that plaintiff's cross-motions be and hereby are denied, and it is further

ORDERED that defendants' motion to dismiss pursuant to Fed. R. Civ. P. 4(j) be and hereby is granted, and it is further

ORDERED that plaintiff's complaint be and hereby is dismissed without prejudice.

H. LEE
SAROKIN,
U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

MEMORANDUM OPINION AND ORDER

January 11, 1990

Mr. Philip E. Foster
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Re: Foster v. Rutgers et al.. Civ. No. 88-3692

Dear Litigants:

Before the court are two motions currently pending in the above-referenced matter: defendant Permanent Panel on Procedures motion for dismissal of the action (and plaintiff's related cross-motion), and plaintiff's motion for reconsideration of court's order May 3, 1989.

BACKGROUND

Plaintiff Philip E. Foster was employed as an adjunct professor by defendant Rutgers, the State University, from 1984 to 1987, when Rutgers failed to renew its three year contract with plaintiff. Plaintiff filed the complaint in this action on August 24, 1988, against the permanent Panel on Procedures ("PPP") and other defendants.

The PPP is an arbitration panel constituted pursuant to Article X of the collectively negotiated agreement between Rutgers an the Rutgers Council of American Association of University Professors ("AAUP") Chapters. The PPP is composed of three employees of Rutgers. On member is appointed by Rutgers, another is appointed by the AAUP. Plaintiff alleges, in part, that the PPP "acted with partiality, arbitrarily and capriciously, with prejudice, without proper procedure, reached conclusions unsupported by and contrary to the evidence, failed to and abused its discretion to the harm and injury of plaintiff." Complaint, Para. 86, Count 6.

DISCUSSION

The Motion to Dismiss and Cross-Motions

On a motion to dismiss, all factual allegations of the complaint must be accepted as true. D.P.

Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984). A complaint may only be dismissed if the moving party establishes that the claimant is not entitled to relief under any state of facts which could be proved to support its claim. Fed. R. Civ. P. 12(b)(6); Leone v,. Aetna Cas. & Sur. Co., 599 F. 2d 566, 567 (3d Cir. 1984), citing, Conlely v. Gibson, 355 U.S. 51, 55-56 (1957)

PPP raises a number of grounds for dismissal, including defendant's immunity from suit. Arbitrators are "clothed with an immunity, analogous to judicial immunity," against any actions brought arising out of the performance of arbitral duties. Cahn v. International Ladies Garment Union, 311 F.ad 113, 114-115 (3d Cir. 1962). See, Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708, 724 (E.D. Pa. 1982). Based on this doctrine, courts have consistently held that neither panels of arbitrators nor individual members are proper party defendants in actions arising out of the performance of arbitrai duties. Ozark Air Lines, Inc. v. National Mediation Bd., 797 F.2d 557, 564 (8th Cir.

1986); UAW v. Greyhound Lines, Inc., 701 F. 2d 1181, 1186 (6th Cir, 1983); Yates v. Yellow Freight System, 501 F. Supp. 101, 105 (S.D. Ohio 1980). Plaintiff complaint names PPP based on a number of the Panel's decisions and procedures. Complaint, Para. 51-69.

Public policy dictates this result. The role of an arbitrator is similar to that of a judge, necessitating insuring that the decision maker may act without fear of subsequent litigation. Wasyl, Inc. v. First Boston Corp., 813 F. 2d 1579, 1582 (ill 10 Cir. 1987). See, Austin Mun. Securities v. Nat. Ass'n of Securities, 757 F.2d 676, 687-688 (5th Cir.). As the United States Court of Appeals for the Seventh Circuit explained: " [I]ndividuals cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit." Tamari v. Conrad, 552 F.2d 778, 781 (1977). The extension of immunity is also consistent with federal policy that supports the resolution of disputes by arbitration. Wasyl, 813 F.2d

at 1582. See, e.g., the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq. (1982); UAW, 701 F.2d 1101 (citing policy supporting the arbitration of labor matters).

Plaintiff urges that where the relief sought is equitable relief, the policies supporting immunity are of less force. The court is aware of no case making such a distinction. When a party seeks equitable relief, the risk exists that a party is using the lawsuit to substitute for an action seeking judicial review. For the foregoing reasons, the court dismisses plaintiff's complaint with prejudice.

The court need not reach the merits of the other claims raised by defendant. Plaintiff makes a number of cross-motions, all of which are moot because of this court's dismissal of the action against PPP. The court denies the cross-motions, including the application for sanctions.

B. The Motion for Reconsideration

Plaintiff moves for reconsideration under Rule 59, Fed. R. Civ. P., of this court's decision of May 3, 1989, dismissing process. Rule 59 and Local Rule 12I require that a motion for reconsideration be filed within ten days after the filing of the court's order. Defendants claim that plaintiff's motion was not timely.

Plaintiff motion was received on May 19, 1989. Excluding weekends as Rule 6 requires, Fed. R. Civ. P., the court concludes that the motion is two days late. the court, therefore, does not have jurisdiction to address the merits of this motion. Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978), reh'g. denied, 434 U.S. 1089 (1978).

The court may grant the relief sought in a Rule 59(e) motion notwithstanding the passage of the ten day period under Rule 60(b). Fed. R. Civ. P. Motions under Rule 60(b) are addressed to the sound discretion of the court. Ross v. Meagan, 638 F.2d 646, 648-649 (3d Cir. 1981). the court interprets plaintiff's application as a claim that this court's decision was

mistaken. Rule 60(b)(1). The arguments raised by plaintiff repeat issues which were fully briefed prior to the disposition of the first motion to dismiss. The court continues to abide by its prior decision.

CONCLUSION

For the foregoing reasons, PPP's motion to dismiss is granted. Plaintiff's cross-motion and motion for reconsideration are denied.

SO ORDERED.

H. LEE
SAROKIN,
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PHILIP E. FOSTER,

Plaintiff,

v.

RUTGERS, THE STATE UNIVERSITY; THE RUTGERS COUNCIL OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE PERMANENT PANEL ON PROCEDURES; AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Civil Action No.88 3692

ORDER

Defendants.

This matter having been opened to the court by counsel for defendant, the Permanent Panel on Procedures, for an order dismissing this action and by plaintiff for reconsideration of the court's decision of May 3, 1989; and the court having received opposition; and the court having reviewed the papers without oral argument, pursuant to Rule 78, Fed. R. Civ. P.; and the court having considered the dispositive legal issues; and for the reasons expressed in the accompanying opinion; and for good cause

IT IS this 12th day of January, 1990 hereby ORDERED THAT defendant's motion to dismiss is granted and it is further

ORDERED THAT the complaint is dismissed with prejudice and it is further

ORDERED THAT plaintiff's motion for reconsideration is denied.

H. LEE
SAROKIN,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

January 26,
1990

Philip E. Foster
23 E. 81st
New York City, NY 10028

Re: Foster v. Rutgers
Civil Action No. 88-3692

Dear Mr. Foster:

The court acknowledges receipt of your letter of January 18, 1990. The order is hereby amended to indicate Docket Number 88-3692 rather than 89-3692. The dismissal is with prejudice for the reasons expressed by the court in its Memorandum Opinion dated January 11, 1990.

Very truly
yours,

H. Lee
Sarokin,
U.S. D. J.

HLS/jm
cc: Linda B. Celauro, Esq.
Paul Schachter, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5117

PHILIP E. FOSTER,

Appellant

v.

RUTGERS, THE STATE UNIVERSITY;
THE RUTGERS COUNCIL OF THE
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS; THE
PERMANENT PANEL ON PROCEDURES;
AND THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS, Joint and Several

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judge,

SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO and WEIS, * Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____

Circuit Judge

* Judge Weis voted only as to panel rehearing

Supreme Court of the United States

No. A-362

Philip E. Foster,

Petitioner

v.

Rutgers, The State University, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS SO ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 1, 1990.

David H. Souter
Associate Justice of the Supreme Court of the United States

Dated this 14th
day of November, 1990.

UNITED STATES DISTRICT COURT
NEWARK, NEW JERSEY

PHILIP E. FOSTER,:

Plaintiff,

Civil Action No. 88-3692 (HLS)

v.

RUTGERS, THE STATE UNIVERSITY; THE RUTGERS COUNCIL OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS THE PERMANENT PANEL ON PROCEDURES;AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

COMPLAINT

Joint and Several

Defendants.

Plaintiff, for his claims against Defendants, states and alleges:

The Parties

1. Plaintiff Philip E. Foster is a citizen of the State of New York and resides at 23 East 81st Street, New York, N.Y. 10028.

2. Defendant Rutgers, The State University, is established under and exists by virtue of the laws of the State of New Jersey; and a citizen of New Jersey and Maintains headquarters in New Brunswick NJ .

3. Defendant Rutgers Council of the American Association of University Professors is the recognized collective bargaining agent for faculty of Rutgers, the

State University, and a citizen of New Jersey and Headquartered in New Brunswick, NJ.

4. Defendant Permanent Panel on Procedures is a body composed under a collective bargaining agreement entered into on or about July, 1983 and consisting of one person appointed by Rutgers, The State University, on by the Rutgers Council of the American Association of University Professors, and a third person jointly appointed by the University and the Council. The Council is a citizen of New Jersey and Functions in New Brunswick, NJ

5. Defendant The American Association of University Professors is a national professional association of chapters such as the Rutgers Council; it is headquartered in Washington, D.C.

Jurisdiction

6. This Court has jurisdiction over the subject matter of this action under: (a) 28 U.S.C. 1332 in that there is diversity of citizenship between the parties and the amount in controversy exceeds $10,000; (b) 42 U.S.C. 1983 in that Plaintiff has been deprived of his Federally protected civil rights as further alleged herein below; and (c) the doctrine of pendent jurisdiction in that Plaintiff's claims under state law are inextricably related to his claims under Federal law. also federal question jurisdiction under 28 USCA 1331 and 1337.

7. This court has personal jurisdiction over the Defendants as a consequence of their actions and those of their agents in and in conjunction with acts in Newark, New Jersey as more fully alleged herein below, and by virtue of their headquarters' location and acts in New Brunswick, N.J.

Background

8. On or about August 15, 1984, Plaintiff Foster entered into a three-year employment agreement as an Associate Professor at Rutgers's Graduate School of Management is a division of the University.

9. Prior thereto Foster was led to believe by Allan Roth, then head of the Environment Area in which Foster was to teach, and David Blake, then Dean of the GSM, that the position was a tenure-track position and that his three-year contract would be renewed so that he would be considered for tenure at the end of a t least six years at the University.

10. The 1986-88 University " Handbook for Faculty ", P. 48 specifically states that " the normal period of probationary appointment for a faculty member at the University . . . is six years . . . .".

11. In reliance upon the representations of Roth and Blake, Foster gave up his prior professional activities and changed his career path in order to become a

university professor at Rutgers or, if tenure were not awarded after six year or more, elsewhere.

11. Shortly after his arrival at Rutgers, Roth proposed a teaching schedule which contradicted promises he had made prior to Foster's acceptance of the School's offer. When Foster pointed this out to Roth, Roth's attitude toward Foster changed from friendly to cold and disinterested. As a result of this and other such schedule of classes Foster was deprived of time necessary for work on research and publication.

The First Article IX Grievances

12. As a result of Roth's conduct, and certain other matters set forth herein below, the Council filed Article IX grievances on Foster's behalf with the University in March and April, 1986.

13. Foster was not a member of the American Association of University Professors nor a member of

the Council, but was informed by the Council that any complaints about the University or its employees had to go through the Council. As a result of what he was told, Foster did not pursue these matters himself, much as he would have preferred.

14. On March 27, 1986, the Council filed an Article IX grievance charging, under the bargaining agreement entered into by the Council and the University, violations of administrative decisions and agreements with Foster regarding the scheduling of his classes.

15. Although such charges constituted a grievance and were fully supported by the record submitted, Susan Cole, Vice-President of the University for Personnel, found that such charges did not constitute a grievance and denied the relief sought by Foster.

16. Cole's finding, however, was unsupported by the record, was arbitrary and capricious, and constituted an abuse of discretion.

17. Prior to his accepting the offer at Rutgers, Blake promised Foster that the School would provide advice and guidance to him in carrying out his teaching and research activities, and Roth implied that he too would provide such advice and guidance as Foster was new to this academic world and would be giving up his prior career if he were to accept the position.

18. Under the terms of the bargaining agreement Foster is entitled to enjoy such rights as specified in the University Regulations, one of which required that Roth " see that adequate supervision, advice and training are afforded new members of the department".

19. Moreover, another regulation requires that Roth inform Foster of his research and publication obligation at the time of his appointment and periodically thereafter.

20. Consistent with his cold and disinterested attitude toward Foster, Roth, who had not explained these obligations at the time of his appointment, refused and failed to provide Foster with advice and guidance as required.

21. Another University regulation required Blake to provide direction for Roth in matters such as giving advice and guidance, but even though Foster went to Blake after Roth refused to assist him, Blake failed to take any steps to see that Roth provided the required assistance.

22. As a result of Roth's lack of assistance, and Blake's failure to see that Roth offered such assistance, Foster was left to flounder, expending, fruitlessly, valuable research and publication time.

23. On March 27, 1986 the Council filed a second Article IX grievance alleging violations of the

aforesaid regulations in failing to provide advice to Foster as required.

24. This grievance was timely filed, and fully supported by the record. Nevertheless, Elizabeth Mitchell, a University employee and agent of Cole, found the grievance to be untimely and she dismissed the charges.

25. Mitchell's finding, however, was unsupported by the record, was arbitrary and capricious, and an abuse of her discretion.

26. Despite the foregoing problems in scheduling and lack of advice, Foster submitted the first draft of a research paper to his departmental research typist in late July, 1985, and expanded drafts soon thereafter.

27. Prior to his acceptance of the offer of the position, both Blake and Roth had assured Foster he would receive sufficient support from the School to prepare

and submit his research work. Never- insufficient typing support resulted in excessive and numerous delays in the preparation of his manuscript.

28. Foster notified Roth and Blake of the typing delays, apparently due to priority being given by the typist to material which was not needed for a personnel review as was Foster's manuscript, and when they refused to do anything about this matter, Foster notified Norman Samuels, Provost of the Newark campus of the University. Even though the Provost then suggested to Blake that priority be given to my manuscript since it was for Personnel review, Blake refused to provide such priority.

29. As a result of the time lost due to these delays, Foster was prevented from preparing and submitting a publishable manuscript before his review; had he had adequate typing support he could have submitted a manuscript which definitely would have entitled him to have had his contract renewed. Given the way the

work was processed, there never was time for Foster to take the material to an outside typist.

30. On March 27, 1986 the Council filed a third grievance with the University charging that the delays and inadequate typing support violated University policy and administrative decisions.

31. Although this third grievance was fully supported by the record, Mitchell found that the charges did not constitute a grievance and denied again the relief sought by Foster.

32. Mitchell's aforesaid decision and finding is unsupported by the record, arbitrary and capricious, and an abuse of discretion.

33. Although the University normally reviews 3 year appointees in the beginning of their second year at the University, where a person has not had significant prior graduate research and/or teaching experience in

the area in which he was appointed, as was the case with Foster, such a person is usually given a one-year preliminary appointment so that in effect they are not reviewed until the beginning of their third year at Rutgers. The purpose of such a policy is to enable such an appointee to have sufficient time to prepare adequate research materials for review.

34. In addition, Rutgers usually also gives one year extension to faculty members who have not had a preliminary year in order for them to complete research so that they may be fairly reviewed.

35. By refusing to hold Foster's review in the beginning of his third year, Blake and Roth deprived Foster of a fair opportunity to show his research and publication potential. Had he had the extra time, Foster would have presented materials which would have assured his contract renewal.

36. On April 30, 1982, the Council filed a fourth grievance alleging that failure to allow Foster sufficient time to present his work violated University regulations, the bargaining agreement, and University policy. Although such claims were timely filed and fully supported by the record, Mitchell again found the claim untimely and denied Foster the relief sought.

37. Mitchell's finding and conclusion with respect to the forth grievance is without support in the record, arbitrary and capricious, and constitutes and abuse of discretion.

38. Foster had notified the Council about the failure of Roth and Blake to provide advice and guidance in a timely fashion and with sufficient time for the Council to file a timely grievance.

39. Foster also notified the Council of the premature review in a timely fashion and with sufficient time for the Council to file a grievance in a timely fashion.

40. If, in the alternative, these two grievances were untimely filed, then the Council acted in a grossly negligent fashion, failed to adequately represent Foster, and mishandled these two grievances to Foster's detriment.

The Article X Grievance

41. In January, 1986, Foster submitted his materials for the personnel review to determine whether his three-year contract would be renewed for a second three-year period, as he was told by Roth that the review would proceed whether or not he submitted them at this time.

42. The review of these materials was conducted in the Spring of 1986: On February 17, the Environmental Department voted against renewal; as did the Appointment and Promotion Committee on February 26, Dean Blake on May 15 and Provost Samuels on June 3. There were numerous procedural and

substantive violations during this review which resulted in the various determinations against renewal. These violation were discussed by Foster with the Council and a draft statement with regard to them was prepared by Foster and submitted to the Council.

43. On September 8, 1986, the Council prepared and submitted "A Filing Form, Article X" outlining the facts and bases for these violations. Various changes were made pursuant to various decisions and a revised Filing Form was filed on March 31, 1987. These and other required steps were taken in order to proceed to arbitration on the University's decision not to renew Foster's contract.

44. The next required step was for Foster to submit an Expanded Grievance Statement to Cole by April 29 (EGS). The EGS set out in detail the facts and bases for the procedural and substantive violations incurred in Foster's review. Although Foster continued to have difficulties in obtaining typing support due to Dean

Davis's interference, Dean Davis had specifically informed Foster on February 18 with regard to the meeting of deadlines on grievance materials that " we will do what we can ".

45. Foster drafted and gave the EGS to his research typist, who upon understanding the urgency and importance of the matter, promised to have the final version done by April 22. Foster prepared a cover letter to Cole dated April 22 and gave it to his secretary, Rosa, instructing her to mail it with the EGS to Cole when she received the EGS from the research typist on or before April 22. This occurred shortly before April 22, for as it was the end of the term, Foster explained to his secretary that he would not be at the School but at home for some weeks.

46. On April 22, Foster spoke with Rosa by phone to confirm that she had received and mailed the EGS and cover letter as instructed. Rosa told Foster that she had been forbidden by Dean Davis to mail it. Foster

then spoke with Grace Andes, the head departmental secretary, explained the situation to her, and asked that she mail it for him. She was informed of the importance and urgency of the matter and agreed to mail it for him on April 22 or 23. However, unbeknownst to Foster, Andes refused to mail the EGS and instead put it in his mail box for him. Apparently Dean Davis had prohibited Grace from mailing it after she spoke with her and had been promised that it would be sent.

47. Sometime thereafter Foster received a memo from Davis dated April 22 indicating that his secretarial service time had been used up, but no mention was made of the EGS or of assistance by the departmental head.

48. On April 30, the University Reviewing Officer communicated to the Council certain matters regarding changes in the Filing Form, and the Council informed Foster of these suggestions on May 4,

together with evidence that they had received notice that the EGS had been submitted.

49. On May 20, Foster returned for the first time to the School and discovered to his astonishment that the EGS had not been mailed. Inquiries were made as to what to do about the EGS and Dean Davis's conduct, and a copy of the EGS was sent forthwith to Cole, together with the original cover letter and an explanatory note indicating that the original was to have been sent to her on April 22.

50. On or about June 4, after receiving the EGS mailed on May 20, the University unilaterally determined that the Article X grievance was no longer viable, and refused to take the next step, which was the appointment of a committee to hear the grievance.

51. In early June, 1987, the Council filed an appeal with the Permanent Panel on Procedures challenging the University's determination that the grievance was

no longer valid. At the time, the Panel consisted of Jean Ambrose, Assistance Vice President for Faculty Affairs, reporting directly to Cole the very person who had informed the Council on or about June 4 that the University considered the grievance invalid; Robert Boikess, a faculty member, and Terrence Butler, a faculty member who also holds administrative positions; the later serving as chair.

52. On July 2, the Panel, based on the Council and the University's submissions formulated the questions as " Was Dr. Foster's delay in filing the (EGS) sufficiently unreasonable to render the grievance withdrawn ". As Foster was now unemployed, he pressed for a determination of the issue. On August 3, Butler told Foster that the panel was not being convened because the Council was not ready to go forward. Under the bargaining agreement, the Panel was to render a decision within 7 days from the filing of the appeal, but by now two months had passed.

53. Foster prodded the Council to expedite this matter and also to clarify certain issues before the hearing: Foster, through the Council, claimed the University had to prove that it suffered prejudice or harm from the one month delay in filing, and that if it could, then he had to demonstrate good cause for the delay. Foster requested through the Council that these point and others be clarified prior to the hearing. In addition, as the Council did not properly present these points to the Panel, Foster also wrote to the Panel directly concerning these matters.

54. On August 24, the Panel responded to these requests, indicating that it would first determine if the delay was reasonable, and if not, was the University prejudiced, in order to invalidate the grievance. The Panel did not address the question of who has the burden in each of these two steps. On August 30 Foster voiced his displeasure with the Panel's plan to the Council, indicating that the Council should insist that under the bargaining agreement, once the EGS is

filed, the University must convene the committee to hear the grievance, and that if they refuse to do so then they must justify their actions, not Foster his. The Council failed to present this matter to the Panel.

55. A hearing was held on Sept. 14 without Foster present at which the Panel considered a claim by Foster that a prior delay of 69 days in an earlier procedural step was attributable to the University and stated in part in its determination that this delay was caused in part by Foster's failure to make certain inquiries. This issue was to be of importance in the resolution of the alleged delay in filing EGS. Apparently the Council told the panel that Foster was responsible for the delays, which was not true as stated.

56. On September 28, a hearing was held by the Panel, at which Foster was present, on the reasonableness of his delay in filing the EGS. Foster was there as a witness, and Wells Keddie was there as a presenter for

the Council. A request by Foster through Keddie to tape record the proceedings was denied by the Panel.

57. First, Keddie was required to present Foster's case that the delay was not unreasonable, rather than, as Foster had asked, the University be required to go forward and show that the delay was unreasonable. Thus, Foster was required to prove a negative, and to carry the burden of proof, whereas it was the University which ought to have had this obligation. Keddie failed to speak up; to effectively present and defend Foster; was perfunctory and wholly inadequate.

58. Although the University had agreed to present no surprise evidence, when it presented it submitted a lengthy memo to the panel. Keddie did not object, but upon Foster's insistence he did. The Panel first read the material, then decided it would not consider it; but having read it, it was already prejudiced by its contents.

59. The University also wanted to call a surprise witness, Dean Davis, to which again Foster through Keddie objected, and the panel agreed not to hear her testimony. Discussion as to what she would say was heard by the Panel.

60a. Ambrose, a member of the panel, already having decided that the delayed ESG invalidated the grievance, was clearly prejudiced against Foster. Keddie knew this, but failed to object.

60b. After Keddie weakly rebutted the University's presenter, the University was allowed a sur-rebuttal.

61. On October 1, the Panel determined that the delay in filing the EGS was unreasonable, and that a further hearing on the issue of prejudice to the University would be held. No reasons whatsoever were given for the conclusion that the delay was unreasonable. Foster maintains that the reasons for the delay presented to the Panel by him together with the

written evidence submitted by him which documented the allegations of fact set forth herein above fully support the contrary conclusion, namely that the delay was reasonable; that the record including the evidence submitted by the University fully substantiates that conclusion; that the decision of the Panel was unsupported by the evidence, arbitrary and capricious, an abuse of discretion, and tainted by prejudice.

62. Shortly after the hearing, on Sept. 28, Foster informed the Panel that his alleged contribution to the 69 day delay was based on advice given to him by the Council, and that it was intentional and not inadvertent part of the strategy recommended by the Council to him. Foster had been advised against bringing this up at the hearing by Keddie. On Oct. 12, much to his astonishment, Keddie wrote to the panel indicating the Council had never so advised Foster. This clearly must have prejudiced the Council against Foster, and yet there can be no sensible reason for Keddie to have written to the Panel as the issue

involving the delay of 69 days had been decided on Sept. 14 and the issue of the unreasonable delay in the EGS had been decided on Oct. 1. Keddie's denunciation, however, apparently had dire consequences for the outcome of the issue of whether the University had suffered any harm for the ESG delay.

63. By Sept. 28, Foster was beginning to suspect that something was afoot with the Council. The Council had sent a copy of a confidential letter from Wasson to me of April 20 to Cole, and it appeared that the Council and the University were conspiring to delay the proceedings through the summer. Then Keddie's letter of Oct. 12. Foster became convinced that the Council was caving in and not properly representing him against the University.

On Nov. 1, Foster wrote to Keddie and complained to Keddie about the weakness of the arguments he made at the Sept. 28 hearing and offered to discuss this

matter with him with a view to the second hearing. Keddie did not reply.

64. On Nov. 11 the Council informed Foster that a hearing had been held and a decision by the Panel reached on Oct. 29 that " given the substantial unreasonableness of Dr. Foster's delay . . .and the measure of injury to the University, the Panel holds that Dr. Foster's Article X grievance is withdrawn ". The decision had been reached again with Ambrose serving on the Panel. No mention was made in the decision of what injury the University allegedly suffered by the 1 month delay in the filling.

65. Foster requested that Keddie request the PPP provide clarification of its decisions, and that Keddie indicate what evidence was presented at the second hearing, and how this evidence was rebutted, but Keddie and the Panel have failed to respond to these requests. Even so, Foster alleges that no evidence could have been presented which could justify

sufficient injury to the University, upon which the Panel could have reached the conclusion it did. Foster alleges Ambrose on Panel; Keddie knew but did not object to prejudiced Ambrose; Keddie failed to fairly represent Foster, was perfunctory, wholly ineffective presenter.

66. Foster maintains that the decisions of the Panel on unreasonable delay and injury to the University are clearly erroneous on the basis of the record, that they are not substantiated by a preponderance of the evidence, and that the decisions were infected with a denial of due process in that taping of the proceedings was prohibited, prejudicial evidence was introduced, there was no established procedure of presentation, the burden of going forward and of proof was placed on the wrong party, and the allowance of the University to a sur-rebuttal was improper. Foster further contends that the Council acted recklessly in the hearings, proceeding in a perfunctory manner, so as to prejudice and jeopardized Foster's position.

67. Related to the foregoing is Foster's claim that under the bargaining agreement if his Article X grievance was not decided prior to the termination of his employment, as it was not, that he was entitled to an extension of his contract. This issue was brought to the Council by Foster, but the Council refused to bring this claim to the Panel after the University refused to extend his employment. Instead, the Council met with the University and jointly agreed not to raise this issue with the Panel. Although the Council proposed filing an additional and separate grievance with the University, the Council failed to do so entirely.

The Second Article IX Grievance

68. On July 1, 1987, at Foster's urging, the Council filed a new Article IX grievance alleging inequitable allocation of secretarial resources by Dean Davis and Dean Upton violating University Regulations and the collective bargaining agreement. Protracted and ultimately unsuccessful efforts were made to obtain

documents from the University to substantiate this claim. On March 30, 1988, a meeting was held by Keddie and Ambrose pursuant to which Ambrose determined that the claimed violation

of the University regulation does not constitute an Article IX grievance and that they had not discriminated against Foster in the allocation of such services in contravention of the bargaining agreement.

69. Foster maintains that the record does not substantiate such a conclusion, that the decision was arbitrary and capricious, and an abuse of discretion, and in the alternative, that Foster was denied access to documents with which he might have substantiated his claims. Dean Davis had arbitrarily determined how much secretarial service Foster was to have, and did so with the intent to deprive him of his fair share of such service. Given his prior experience with arbitration, Foster decided not to proceed with arbitration of this decision, but requested the Council to take the matter

to court. He has not had a determinative answer from the Council, and has decided to proceed himself with this claim. It also appeared to Foster by this point that the Council was no longer effectively representing him, and that he ought to proceed on his own, something he had hoped to do from the very beginning of these troubles.

Miscellaneous

70. The collective bargaining agreement in effect at the time of Foster's employment provided that he shall be entitled to enjoy " all terms and conditions of employment . . . provided for in the University Regulations and Procedures Manual " as well as those provided in the agreement itself.

71. A second employment contract signed by Foster in the Fall of 1984 further entitleds him to the benefits set forth in a booklet entitled " Policy with Respect to

Academic Appointments and Promotions ", 1969 as amended.

72. The University, the Council, and the Panel deprived Foster of his rights and privileges as set forth in the agreement, the regulations, the manual and the booklet, and the contracts.

73. As a consequence of the aforesaid acts of the Defendants, Foster standing in the academic community was seriously jeopardized and his ability to take advantage of other employment opportunities has been seriously limited.

74.By virtue of the provisions in the manual, booklet, regulations, employment contracts, and the contractual relationship arising out of Defendants' conduct, both actual and implied, Foster acquired a property right to a renewal of his contract by the University.

Count I

75. Plaintiff repeats the allegations contained herein above

76. Defendants violated the civil rights of Foster protected by the Constitution of the United States in that he was denied due process and equal protection of the law.

77. The University is an instrumentality of the State of New Jersey, and the actions of Blake, Roth, Davis, Upton, and the other employees of the University heretofore alleged were the duly authorized actions of said State instrumentality.

Count 2

78. Plaintiff realleges the allegations of contained herein above.

79. Defendants violated the civil rights of Foster protected by the Constitutions of the States of New York and of New Jersey in that he was denied by Defendants' due process and equal protection of the law.

Count 3

80. Plaintiff realleges the allegations contained herein above and further alleges that Blake and Roth believed and knew that Foster would not be given tenure when and if he was to come up for tenure because there would be no opportunity to offer anyone teaching the classes Foster was to teach a tenured position, yet they led Foster to believe that he could receive tenure if he was otherwise deserving of such an appointment, and further that Roth and Blake and other employees of the University determined not to renew Foster's contract in order to avoid having to face the fact that there would be no tenure slot for him at the end of another three or four years.

81. Foster was fraudulently induced by Defendant Rutgers, The State University, through the duly authorized acts of its agents, in entering into a contractual relationship with the University, and such deception was maintained even after Foster had begun his performance under said contract.

Count 4

82. Plaintiff realleges the allegations contained herein above and further alleges that the University, through its duly authorized agents acting within the scope of their duties, entered into both a contract with Foster and a contract with the Council of which Foster was a third-party beneficiary.

83. The University breached the actual and implied covenants of these agreements in the performance of their obligations thereunder, and so did in bad faith through both actions and failing to take action, as a

result of which Foster suffered emotional distress from December 16, 1984 until the present.

Count 5

84. Plaintiff realleges the allegations set forth above.

85. Defendant Council and Defendant Association, through the acts of the Council, wrongfully interfered with the Plaintiff's contractual relationship with the University, breached their duty of fairness of representation of Plaintiff, acted in bad faith, with hostility, perfunctorily, failed to pursue matters fully and adequately, and ultimately conspired with the Defendant University to Plaintiff's disadvantage and harm, and further acted recklessly, wantonly, and indifferently toward Plaintiff, all to the harm and injury of Plaintiff. Also with malice and intent to harm Foster.

Count 6

86. Plaintiff realleges the allegations set forth above.

87. Defendants Panel and University, through its agents, duly authorized within scope of duty, acted with partiality, arbitrarily and capriciously, with prejudice, without proper procedure, reached conclusions unsupported by and contrary to the evidence, failed to properly allocate the burden of going forward and of proof, and abused its discretion to the harm and injury of Plaintiff.

WHEREFORE, Plaintiff demands judgement against Defendants awarding him:

A. Vacatur of the decisions of the Panel determining that the Article X grievance should be withdrawn and an order that the University proceed forthwith with its response to the EGS;

B. An Order granting Plaintiff the relief sought in his Article IX grievance, including the renewal of his 3 year contract,

C. Monetary relief in the aggregate amount of $1,000,000, together with interest according to law;

D. Plaintiff's costs, fees, expenses and disbursements incurred as a consequence of this action; and

E. Such other relief as this court deems just and equitable.

Dated:

Philip E. Foster
23 East 81st Street

New
York,
N.Y.
10028
tel.212-
988-3306

Case No. A-362

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PHILIP E. FOSTER, Plaintiff,

Index No. 88-3692

(HLS)

v.

RUTGERS, THE STATE UNIVERSITY ET AL.,

Joint and Several

Defendants.

AFFIRMATION OF PHILIP FOSTER IN OPPOSITION TO DEFENDANTS MOTIONS TO DISMISS AND QUASH AND IN SUPPORT OF

PLAINTI
FF'S
CROSS-
MOTIONS

Philip Foster, an attorney duly admitted to the practice of law in N.Y. affirms the following to be true:

1. I am the plaintiff in this action and make this affirmation in opposition to the motions to dismiss and to quash of defendants Rutgers, The State University ("Rutgers"), The Rutgers Council of the AAUP ("the Council"), and the American Association of University Professors ("AAUP") and in support of my several cross-motions as explained more fully in my brief.

2. I graduated law school in 1977 and, having no interest in being a litigator, took only one course in civil procedure, the required first-term course. I was

admitted to the practice of law in the State of new York in 1980 and have neither applied for nor been admitted to the practice of law in New Jersey or the Third Circuit. During the period 1978-84 my legal work consisted of almost all corporate and securities work, and from 1984-88 I was engaged in teaching corporate or securities law and, part-time, practicing corporate and securities law. I am not and never have been a practicing litigator, and aside from some pro se matters, have had very little litigation experience. Defendants and their counsel knew that I am business attorney, primarily an academic, and not a practicing litigator when commencing this action.

3. As a result of problems with my area chairman at Rutgers and the administration at Rutgers in 1984-86, and at the suggestion and upon the advice of the Council, the Council filed on my behalf 4 grievances with Rutgers (the " First Article IX Grievance "). Upon the filing of these grievances with Rutgers, the Council notified its counsel, Reinhardt and Schachter

("R&S") of the actions it was taking with regard to these grievances. A true copy of the letter containing such notice is attached as Exhibit A hereto, a letter dated Mar. 27, 1986. As the Council pursed these grievances with Rutgers, they discussed the proceedings with R&S. A true copy of a letter referring to such discussion dated June 6, 1986 is attached hereto as Exhibit A-2, a third such letter, from R&S to the Council dated July 23, 1986 is attached hereto as Exhibit A-3, and a fourth letter referring to such discussions dated 8/5/86 is attached hereto as Exhibit A-4.

4. After Rutgers perfunctorily decided all four of the First Article IX Grievances adversely to me, I discussed the possibility of challenging these determinations in court with the Council and sought its help in so doing. The Council notified R&S of the possibility of court proceedings in this regard. A true copy of a letter containing such notification dated August 21, 1986 is attached hereto as Exhibit B. The

merits of this challenege were discussed by the Council with R&S and thereafter the Council decided not to assist me in a legal challenge to the determinations.

5. In September, 1986, I filed a complaint pro se against Rutgers challenging its determination of the First Article IX Grievances in the Southern District of New York court. A true copy of such complaint is attached to Rutgers's brief submitted in support of its motions in this action as Addendum A. Because New York law did not permit service by certified mail, service was made under FRCP 4(c)(2)(C)(ii) upon David Scott, University Counsel, by regular mail, employing a Form 18-A prepared by the Southern District for such occasions. A true copy of this affirmation of service, dated December 6, 1986, is attached hereto as Exhibit C-1.

6. In the Southern District action Rutgers, represented by Linda Celauro, Esq. of the Newark firm of Carpenter, Bennett & Morrisey, sought dismissal of

the complaint inter alia for lack of personal jurisdiction, and I responded with a cross-motion to transfer the Southern District proceeding to the District Court in New Jersey if the court found jurisdiction proper but venue incorrect. A true copy of the cover of my brief and the pages containing my reference to my arguments to transfer are attached hereto as Exhibit D, and the cover page and relevant pages from the reply brief by Linda Celauro are attached hereto as Exhibit D-1. The complaint was dismissed and the cross-motion for transfer denied sub silentio. A true copy of the decision finally dismissing the complaint with no mention of the motion to transfer is attached to Rutgers's brief in support of their motions made in the instant action as Addendum D. I informed the Council of the results of the Southern District proceedings.

7. Meanwhile, in or about June, 1986, incorrectly and wrongfully decided not to renew my teaching contract as promised and, with the advice of the Council, it filed

on my behalf a new grievance with Rutgers challenging the decision not to renew (the Article X Grievance). In April, 1987, Rutgers attempted to frustrate the Article X Procedures, and in response thereto, at the suggestion and with the advice of the council, the Council challenged Rutgers' conduct on my behalf by bringing its actions before the Permanent Panel of Procedures ("PPP"). The Council informed R&S of this step and discussed the proceedings with them throughout. A true copy of a letter with notice of such proceedings dated September 1, 1987 and another dated September 10, 1987 are attached hereto as Exhibits E and E-1. The Council, however, acted grossly negligently and legally unsatisfactorily in representing me before the PPP and was so informed by me shortly thereafter. A representative of Rutgers sits on the PPP and thus Rutgers was thoroughly informed of the PPP proceedings and outcome.

8. In October, 1987, after the inadequate presentation of my position before the PPP by the Council, the PPP incorrectly and wrongfully concluded that there was nothing wrong with Rutgers' conduct in attempting to frustrate the Article X Grievance. I sought assistance for the Council in challenging the PPP decision in court. The Council considered my request and discussed it thoroughly with R&S and decided not to assist me by bringing a court challenge to the PPP decision. A true copy of a letter discussing this matter with notice of notification to R&S dated November 19, 1987 is attached hereto as Exhibit F, a true copy of a letter denying legal assistance with notice to R&S dated February 25, 1988 is attached hereto as Exhibit F-1, a true copy of a letter concerning litigation dated March 1, 1988 is attached hereto as Exhibit F-2, and a letter from R&S discussing this matter and informing me that no further union appeals were possible dated March 17, 1988 is attached hereto as Exhibit F-3. No notice was given by the Council to Foster that if he wished to pursue litigation on his own that he must do

so within 6 months of its letter to him of March 17, 1987.

9. In addition, in or about July, 1987, at the suggestion of and upon the advice of the Council, the Council filed additional grievances with Rutgers as a result of other conduct by its staff, the Second Article IX Grievances, and kept its counsel, R&S informed of these proceedings. A true copy of a letter discussing these grievances with notice thereof to R&S dated March 23, 1988 is attached hereto as Exhibit G and a second such letter dated March 29 is attached hereto as Exhibit G-1. On or about March 30, 1988 Rutgers rejected these grievances incorrectly and I sought the help of the Council in pursuing this matter in court, a request of which R&S received notice, but the Council refused to provide such help. A true copy of a letter referring to my request for legal help dated April 26, 1988 and a letter rejecting such request dated May 23, 1988 are attached as Exhibits G-2 and G-3 respectively; a copy thereof was sent not only to R&S,

it should be noted, but also to Judy Green, then President-elect of the Council, the person upon whom service against the Council was made in this action.

10. On August 24, 1988, as the six-month deadline for initiating legal action on my own under Federal labor law challenging the PPP decision approached, I filed the complaint in this action in the District Court of New Jersey in Newark, including therewith the claims raised against Rutgers in the Southern District proceeding challenging the rejection by Rutgers of the First Article IX Grievance, the claims arising out of the rejection by Rutgers of the Second Article IX Grievances, and some additional claims deriving therefrom or related thereto. On August 25, 1988, the clerk's office issued the summonses herein, which specify that I was a pro se plaintiff, and giving notice as to what each of the defendants herein were required to do upon receipt thereof, by when it must be done, and what would happen if they did not do so. A true copy of one of the summonses is attached hereto as Exhibit

H. No mention is made therein of a Form 18-A or of service under any federal service provision.

11. On or about August 23, I wrote to both R&S and the Council informing them that an action had been filed against the Council and asking if they would accept service of the summons and complaint therein by mail instead of by personal service. Each recipient responded, with copies of their replies sent to the other. R&S replied that it was not authorized to accept service on behalf of the Council, and the Council replied that service " can be made only in forms permissible by rules of the court ". A true copy of R&S's letter reply to me dated August 31, 1988 is attached hereto as Exhibit I and a true copy of the Council's reply to me dated September 9, 1988, together with my handwritten notes of certain conversations thereon, is attached hereto as Exhibits I-1. The letter from the Council was signed by Judy Green, the person upon whom service for the Council was later made.

12. On or about September 10, 1988, I sent a letter to Rutgers informing it that an action had been commenced naming it as a defendant and asking if it would accept service of the summons an complaint by mail instead of by personal service or if it would otherwise authorize its law firm to do so. This letter was received in the office of the President of Rutgers on September 14, 1988. A true copy of this letter with the date-stamp marking receipt is attached to the affidavit of David Scott submitted by Rutgers in support of its motion to dismiss as Exhibit 1 therein. Two days later, on September 16, Scott, University Counsel, replied to me that " Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under these rules ", asked that the summons and complaint be sent to him, and stated that he was asking the firm of Carpenter, Bennett & Morrissey to " continue to represent the University in this matter ". No mention is made in his letter of the federal service provision,

FRCP 4(c)(2)(C)(ii), or of form 18-A. A true copy oh his letter to me dated September 16, 1988, together with my handwritten notes of certain conversations thereon, is attached hereto as Exhibit J.

13. Sometime, I believe shortly, after receipt of the Council's letter to me of September 9, 1988, I called the District Court Clerk's Office in Newark (the "Clerk's Office"). I explained that I was a pro se plaintiff in a case filed with the court and asked the person with whom I spoke, a clerk in the office, what type of service was permitted. The clerk informed me that service could be made by certified mail, return receipt requested. I noted this, together with other information, on the letter I had received from the Council dated September 9, 1988, true copy of which is attached hereto as Exhibited I-1. I also asked how long I had in which to do this, and was referred to one of Judge Sarokin's clerks, who told me that I had 120 days from the filing of the complaint; I noted this on the September 9 letter as well.

14. After attempting to locate an AAUP office in New Jersey without success, I called the AAUP office in Washington, D.C. in mid-September to ascertain whether it was a corporation or an association in order to ascertain the person upon whom service for the AAUP should be made.

15. Sometime after mid-September, 1988, I went to the library to check on whether certified mail service was permitted (it had not been permitted in the action started in the Southern District discussed above) and to see to whom specifically such service ought to be addressed. I first found FRCP 4(c)(2)(C)(i) which referred me to service under state law service provisions, in this case New Jersey law, and I looked up New Jersey law on means of service and found that N.J. Civil Practice Rule 4:4-4 which authorized service by registered, certified, or ordinary mail if the party upon whom service is made answers or proceeds within 60 days, thus confirming what I had been told by the

clerk. I made note of this and of other matters upon a piece of notebook paper which I had taken to the library. A true copy of this page with my notes thereon is attached hereto as Exhibit K.

16. Sometime after visiting the library I tried to see if I could find an attorney knowledgeable in the field of labor law who might be able to assist me with this case; I was concerned about whether or not to add additional parties and if so how and when to do this. I spoke with Mr. Jeffery Glenn, Esq. of the firm of Kaplan, Russin who had been successful in obtaining an injunction prohibiting the termination of teaching contracts for three faculty members at CUNY. He told me that he would require a $5,000 retainer to take on the case, estimated the total cost of the case, and explained to me that the only reason the CUNY case was financially viable was because there were three faculty members as plaintiffs in the same case; He informed me, however, that he would review my complaint and discuss it with me for $200 per hour. I

noted down this information, together with other comments he made, on the letter dated September 16 which I had received from Rutgers, a true copy of which is attached hereto as Exhibit J. Since Rutgers had wrongfully renewed my contract I had been unable to obtain full-time employment and had been in fact had been living on unemployment compensation benefits since June, 1988. I felt, therefore, that I was unable even to afford the $200 per hour consultation rate and thus unable to engage Mr. Glenn. I am still living on unemployment compensation benefits and am still unable to afford the financial burden of obtaining legal counsel for this matter. In my conversation with Mr. Glenn I also raised the issue of service and under state law and he confirmed that this was a proper way to proceed. I noted on the September 16 letter from Rutgers " follow state practice for service ", as Exhibit J shows.

17. After speaking with Mr. Glenn I considered adding a new cause of action as well as new parties to the case,

and called the clerk's office for assistance with regard to the proper Procedures. I was told that if new parties were to be added, that I needed a new summons from the clerk's office within 120 days of the filing of the complaint. I noted this information on the sheet of notes I had made in the library, attached hereto as Exhibit K.

18. As the 120 -day deadline approached, I prepared to serve the summons and complaint by certified mail, as permitted under New Jersey law. I assumed that service of the summons and complaint would be made upon the mailing thereof, and thought it would be advisable to use certified mail since I would then have proof from the post office as to when the summons and complaint were actually served. I also thought it would be a good idea to have a return receipt to show that the summons and complaint were actually received in case some problem should arise. On Monday morning, December 19, 1988, I called the clerk's office to ask if service were used, whether Form-18A should be sent

with the summons and complaint, and if so what should be done about the discrepancy in the time in which to reply between the form and the summons for the AAUP, I made note of my questions as it took a few calls and some time to reach someone who could answer these questions in the clerk's office (I made these notes, as I often do of phone conversations, on the back of a used envelope). I finally spoke with a clerk, named Mary Fessel (?), explained that I was a pro se plaintiff in a case filed with the court, that I was about to serve a summons and complaint by certified mail, return receipt requested, and ask if I should submit an affirmation of service to the court. She said that I should and I noted this down. I then asked if I should send a Form-18A and, as I recall, she said not to worry about the discrepancy. I noted down that I should send the Form 18A. A true copy of the back of the envelope with my notes of the conversation and my notes of my questions is attached hereto as Exhibit L, and a true copy of my January phone bill showing calls

to the Clerk's Office on December 19, 1988 is attached hereto as Exhibit L-1.

19. With the information I had received from the Clerk's Office in hand, and in reliance thereon, I proceeded to type up an affirmation of service and prepare copies of Form 18-A. I took one of the forms of Form 18-A which I had left over from the action commenced in the Southern District, changed the name of the district at the top, typed in the caption an index number, went to the local copy shop, had copies of the affirmation, the summons and complaint, and of Form 18-A made. A true copy of the revised form 18-A is attached hereto as Exhibit M. Although, as I recall it, the clerk had said it would be alright to leave the discrepancy in the Form 18-A to sent to the AAUP, I felt uncomfortable with this because I had left such a discrepancy in the Form 18-A sent to Rutgers in the Southern District action, intending thereby to allow them 30 rather than 20 days in which to respond, but Rutgers counsel used this discrepancy to as a basis for

alleging they were confused and thus received insufficient service. A true copy of pages from Rutgers reply brief submitted by Linda Celauro, Esq. making these arguments is attached hereto as Exhibit M-1. I therefore whited-out the 20 days on one copy of the Form 18-A and inserted 35 days so that it would be consistent with the summons for the AAUP and I inserted the name of the AAUP thereon as the party to be served. A true copy of this copy of Form 18-A is attached to the affidavit of Alesia Pope submitted in support of the motions of the Council and AAUP. I then filled in the names of the other defendants on the other copies of Form 18-A. Because the form stated that the " summons and complaint accompanied by the form were being served " pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure ", and at the time I had no idea whatsoever what that meant, I concluded that it was prudent not to sign the sworn statement or to date it as required by the from itself, and therefore left the place for "Signature" and "Date of Signature", as well as the space above for the

date of mailing of the form, blank on all the copies I had made. A true copy of the Form 18-A without my signature or dates sent to the AAUP is, as just noted, attached to the affidavit of Alesia Pope submitted in support of the motions of the Council and the AAUP. A true copy of the Form 18-A sent to Rutgers without my signature or dates is attached as Exhibit 4 to the affidavit of David Scott submitted in support of Rutgers' motion. A true copy of the Form 18-A sent to the Council without my signature or any dates is attached to the affidavit of Faye Schreier as part of Exhibit 1 thereto submitted in support of the motions of the Council and the AAUP. Only one such copy of Form 18-A was sent to each of the Defendants, and no self-addressed, postage prepaid envelope or any return envelope of any sort was included with the summons and complaint and single copy of the Form 18-A sent to each of the Defendants.

20. I then when to the post office, and placed within an envelope properly addressed to each of the

defendants, a copy of the appropriate summons, a copy of the complaint, and a copy of the appropriate Form 18-A. I filled out the proper forms to send each envelope by certified mail, return receipt requested, attached these forms to the envelope as directed, paid the proper postage for each envelope, sealed the envelopes, and gave each to the clerk at the post office window to whom I paid the postage. The clerk stamped the date of December 19, 1988 on each of the certified mail receipts: number P 826 696 984 for the envelope sent to Davis Scott, University Counsel, 105 Geology Hall, Rutgers University, New Brunswick NJ for defendant Rutgers; number P 826 696 979 for the envelope addressed to Judy Green, Pres., Building 4103 Kilmer Campus, Rutgers University, New Brunswick, NJ for the defendant Council; and number P 826 696 977 for that sent to the President, AAUP, 1012 14th Street, N.W. Washington, D.C. A true copy of each these receipts is attached hereto as Exhibit N. My recollection is that I also asked the clerk to cancel the stamps with the date-stamp and that he did this,

stamping them December 19, 1988. The clerk, also stamped each envelope " CERTIFIED MAIL Return Receipt Requested ". A true copy of one envelope is attached to the Affidavit of Alesia Pope submitted by AAUP.

21. Prior to going to the copy shop I typed up an affirmation of service stating only that " a copy of the summons and a copy of the Complaint herein were duly served on each of the present Defendants herein " and after mailing the envelopes to the defendants as just described, I signed and then mailed the original of the affirmation to the Clerk's Office in Newark. It was filed in the Clerk's Office on December 23, 1988. A true copy of the filed original affirmation of service is attached to the affidavit of David Scott submitted in support of the Rutgers motion as Exhibit 3 thereto.

22. The United States Postal Service Direct Mail Manual, Rules 912.5 and 911.4 establish certified mail delivery Procedures and these Procedures authorize

delivery of certified mail only to " the addressee or his authorized representative ", require identification of the person to whom delivery is being made if such person is unknown to the deliverer, and require the signature of the person receiving such mail. A true copy of pages 483 and 479 of the current edition of such manual containing such rules is attached hereto as Exhibit O. The supervisor of Window Services at the New Brunswick Post Office informed me that if delivery is made at a post office, a form authorizing a recipient other than the addressee to accept delivery on behalf of the addressee must be on file in that post office before delivery can be made to any such person. I spoke with Mr. the Supervisor, Mr. Hutmacher, on January 25, 1989 when he told me above information.

23. Mr. Gene Hutmacher, Supervisor of Window Services at the New Brunswick Post Office also informed me on January 25, 1989, that the envelope addressed to David Scott was accepted by Mr. Russel Smith a person duly authorized to accept mail for

David Scott as University Counsel on David Scott's behalf at the New Brunswick Post Office on December 21, 1988 and that a form authorizing Mr. Smith to make such acceptance had been on file at the post office for some time. The return receipt attached to the envelope addressed to David Scott, University Counsel, is initialed with what appears to be the letter " R ", evidently Mr. Smith's initial, and stamp dated " Dec 21 1988 ". The front side of this form indicates that it too was mailed back to me on December 21, 1988. A true copy of the front and back of the return receipt attached to the envelope mailed to Judy Green, President, is attached hereto as Exhibit Q. I received this receipt shortly after December 21, 1988.

25. On or about January 30, 1989 I spoke with Mrs. King, a clerk at delivery services of the Washington D.C. post office which or rather from which the envelope addressed to the President, AAUP was delivered and she informed me that a certified letter so addressed would not have been delivered to someone

who was not authorized to accept such delivery on behalf of the President, and further that if such an envelope also had a return receipt request form on it that the person accepting delivery would be asked to sign the return receipt. I explained that the person accepting delivery had not signed and returned the receipt, and she said she would attempt to find out what happened. I gave her the certified receipt number and she said she would speak with the supervisor about it. I called several days later and was told by her that the supervisor could find no trace of the letter, but that he would continue to look for information as to what had happened. I was also told to make a formal request through my local post office. I spoke with a clerk at my local post office, who told me I would have to come and fill out a form at the post office and that it would take a few weeks to have an answer. Prior to serving or filing this affirmation such a request will be made, but it is most doubtful that a response can be had before the February 27, 1980 return date.

26. After receiving a copy of the Form 18-A sent to Scott purportedly signed by him on December 23, 1988, I put such copy in my file for safe keeping along with the return receipts, and did not file such copy or any copy thereof with the court. None of the other defendants returned to me a copy of the Form 18-A received by them nor did I file any copies of any Form 18-A at all with the court.

27. Prior to receipt of their motion papers, none of the Defendants and neither of their counsel contacted or even attempted to contact me with regard to service of the summons and complaint or any other matter, in any way whatsoever.

28. On January 9, a copy of the papers served on my by Linda Celauro, Esq. counsel for Rutgers, was sent to R&S, counsel for the Council and the AAUP, and on January 18, 1989, R&S, counsel for the Council and the AAUP sent copies of the papers they served on me

to Linda Celauro, counsel for Rutgers. A true copy of a letter dated January 9, 1989 attesting to Celauro sending copies to R&S is attached hereto as Exhibit and a copy attesting to R&S sending copies to Celauro dated January 18, 1989 is attached hereto as Exhibit R-1.

29. As of the typing hereof arrangements are being made for personal service on Rutgers and the Council within 60 days of the mailing of the summonses to them, and such arrangements will be made with regard to the AAUP if such service is not too costly for me to afford.

30. The allegation by David Scott made in his affidavit in support of Rutgers' motion that the summons and complaint " were not served " (emphasis in the original) on Rutgers on December 19, 1988 is false.

31. The " litigation experience " mentioned in my resume submitted to Rutgers in 1984 was de minimus.

The equal opportunity matter consisted of digesting cases to ascertain important facts and occurred in 1973 or 1979 and took at most a few days. The landlord-tenant matters are pro se matters which, regrettably, continue to this day as a result of problems between myself and my landlord. The breach of contract probably refers to one matter in which I represented a client while in private practice. None of these matters involved questions of service under federal or New Jersey law and none involved the Third Circuit's interpretations of these provisions. As the cover letter accompanying the resume states, I had considerable experience " in corporate law, a background in international law, and, in an unrelated area, some teaching experience ". A true copy of this letter is attached as Exhibit A to the Brief filed by Rutgers in the motion sub judice.

32. During my interviews at Rutgers I informed them that I was a corporate attorney, and as the university regulations prohibited maintaining an outside practice

and I completed forms attesting to adherence with the rules, they must have known that I was a teacher and not a practicing attorney. Linda Celauro, who also represented Rutgers in the Southern District obviously must have known that I was a teacher in the business school there, for so the brief she submitted in that action states, and therefore that I was not a practicing attorney. A true copy of a page of that brief so stating is attached hereto as Exhibit S. The Council, which represented me as a teacher at the school obviously knew I was a teacher and not a practicing attorney. And the fact that I was a teacher and not a practicing attorney was communicated by the council to R&S and by me to them as well in various conversations had between the Council and R&S and between myself and R&S. There can be not question but that Rutgers and the Council and counsel for Rutgers and the Council and AAUP each knew that I was a corporate attorney who had gone into teaching and not either a litigator or practicing attorney when they filed the briefs for the motions now before the court.

33. The allegations made in the Complaint filed with the court on August 24, 1988 in this action are hereby incorporated herein as if fully set forth here.

Dated: February 9, 1989

_____

Philip E. Foster, Esq.

Sept. 10, 1988

Dear Sir or Madam:

Re: Foster v. Rutgers et al.

This is to inform you that Rutgers is a defendant in the above-captioned matter and to ask if you would accept service of the summons and complaint therein by mail, or authorize your law firm to accept such service by mail, saving me a trip to New Brunswick.

Thank you for your attention.

Yours,

P. Foster
23 East 81st St

Case No. A-362
NYC NY 10028
212-988-3306

Exhibit 1

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

Office of University Counsel.New Brunswick. New Jersey 08903.201/932-7697

September 16, 1988

Mr. Philip Foster
23 East 81st Street
New York, New York 10028

Re: Philip E. Foster v. Rutgers, The State University, et al.

Dear Mr. Foster:

Your letter dated September 10, 1988 has been referred to me for response. Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under

those rules. Please send the summons and complaint to me, David R. Scott, University Counsel, Office of University Counsel, Geology Hall, Room 105, New Brunswick, New Jersey 08903. For your information, I am asking the law firm of Carpenter, Bennett & Morrissey in Newark, New Jersey to continue to represent the University in this matter.

Sincerely,
David R. Scott
University
Counsel

cc: Linda B. Celauro, Esq.

Exhibit 2

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

Office of University Counsel.New Brunswick. New Jersey 08903.201/932-7697

September 16, 1988

Mr. Philip Foster
23 East 81st Street
New York, New York 10028

Re: Philip E. Foster v. Rutgers, The State University, et al.

Dear Mr. Foster:

Your letter dated September 10, 1988 has been referred to me for response. Since the applicable federal rules of civil procedure call for accepting

service by mail, the University will accept service under those rules. Please send the summons and complaint to me, David R. Scott, University Counsel, Office of University Counsel, Geology Hall, Room 105, New Brunswick, New Jersey 08903. For your information, I am asking the law firm of Carpenter, Bennett & Morrissey in Newark, New Jersey to continue to represent the University in this matter.

(XIth - brought control
XIVth - state or public action
- $200 hr. to review
Mount Healthy case)

Sincerely,
David R. Scott
University
Counsel

(breach of
contract)

cc: Linda B. Celauro, Esq.

(claim of reasonable contract expectations !!!)

(3 copies needed of complt)

(Union claim - 301)

(follow state practice for service)

(procedure-bad faith secretary)

(must win procedural to get to merits)

Exhibit J

Law Offices
REINHARDT & SCHACHTER, P.C.
744 Broad Street . Suite 3100
NEWARK, NEW JERSEY 07102
201/623-1600

August 31, 1988

Mr. Philip Foster
23 East 81st Street
New York, New York 10028

Re: Your Letter Dated August 25, 1988 (Postmarked August 29, 1988)

Dear Mr. Foster:

Please be advised that this office is not authorized to accept service of process or complaints on behalf of the Rutgers Council of AAUP Chapters.

Very truly
yours,
REINHARDT
&
SCHACHTER,
P.C.
Paul Schachter

ps:lm

cc: AAUP

Exhibit I

AAUP American Association of University Professors
bldg. 4103, Kilmer campus.Rutgers, The State University, New Brunswick, N.J. 08903 (201) 932-2278/9

RUTGERS COUNCIL OF AAUP CHAPTERS

September 9, 1988

Mr. Philip Foster
23 East 81st Street
New York, New York 10028

Dear Mr. Foster:

Service on the Rutgers Council of AAUP Chapters can be made only in forms permissible by rules of the court in which you filed your complaint.

Sincerely yours,
Judy Green
President

cc: Judy Goldberg
Wells H. Keddie
Reinhardt & Schachter, P.C.

(- serve by certified mail return receipt requested)
(- in fed. rules of CP)
(over 18 & unrelated to case!)

(Dist Ct. Newark 201-645-3730 (?))
($5 - for copy local rules-)
(Clerk US Dist Ct.
US Courthouse

180 Case No. A-362

Box 419

Newark 07102)

(-summons & complaint)

(Sarokin - Dist Clerk 120 days)

Exhibit I-1

(1.service by certified mail (?)

Parties - 1) Rutgers-IBA:65:63

2) Rutgers Council of AAUP)

(65-2-instead of state for

purposes of operating

state university)

(add

Wells Keddie individually & others?

(3)PPP

(so, members of PPP!)

(+State law claim

against union))

(4)AAUP)

([missing] add

R Council Pres.?)

(Service - NJ 2A:64-2-unincorp asocs)

(service on president or other
officer or . . . person in charge of
the business org or association)

(4:4-4 - by registered, certified or
ordinary if answer w/i 60 days!)

(Changes - if new parties - SL? - need new
summons w/i 120 days)

(20 days)
(if no new parties, new file & serve first
amended complaint)

([missing] F Supp 1306 R v. Miller - XIth Amend)
([missing] F2d 1303 - Kovats v. Rutgers! (682 FS 213)
)
(Maybe serve and file amended
no new parties
then on Fri see if need[?] amended?)

Exhibit K

([illegible] and complaint)

(Mary Fessel)

(clerk)

([illegible])

(Questions)

(1) information of service?)

_____(Yes)

(2) Form 18-A ?)

(35 - 20)

(yes)

Exhibit L

Case No. A-362 185

AT&T Account Number: 212

988-3306 768 732

January 16, 1989

Page 1 Last page

[missing]tion of your bill is provided as a service to AT&T. There is no connection between [missing]k Telephone and AT&T. You may choose another company for your long distance [phon]e calls while still receiving your local telephone service form New York Telephone.

[missing]l numbers

[I]nquiries call AT&T 1 800 222-0300

[Summ]ary of AT&T charges

[missing] calls $4.03

[missing]s receipts tax surcharges .08

Federal Tax (3%) .12

Total $4.23

[missing]ed calls

[missing]ly dialed

Date.	Place called.	Number called	Time	Rate	min.	Amount
Dec 19	Newark NJ	201 645-3730	10 24	AM	DAY	2 $.42
Dec 19	Newark NJ	201 645-3730	10 31	AM	DAY	1 $.25
Dec 19	Newark NJ	201 645-3730	10 31	AM	DAY	1 $.25
Dec 19	Newark NJ	201 645-3730	10 43	AM	DAY	5 $.93
Dec 20	Newark NJ	201 645-4552	11 08	AM	DAY	2 $.42
Dec 20	Montcl NJ	201 783-8659	7 08 PM	EVE	1 $.16	
Dec 22	BridgeP CT	203 576-4869	10 32	AM	DAY	1 $.27

Dec 28	Trenton NJ	609 984-1677	10 59
AM	DAY	2 $.48	
Jan 10	Nw Lond CT	203 443-5378	6 17 PM
EVE	2 $.31		
Jan 11	Nw Lond CT	203 443-5378	2 27 PM
DAY	1 $.27		
Jan 11	Blomfld CT	203 242-2917	2 29 PM
DAY	1 $.27		

Total _____$4.03

Exhibit L-1

UNITED STATES DISTRICT COURT

NEWARK, NEW JERSEY

PHILIP E. FOSTER,

Plaintiff

Index No.

88-3692(HLS)

v. AFFIRMATIO

N OF

SERVICE

RUTGERS, THE STATE UNIVERSITY

et. al.,,

Defendants

Philip Foster, an attorney duly admitted to the practice of law in the State of New York, affirms that a copy of the Summons in the State of New York, affirms that a copy of the Summons and a copy of the Complaint

herein were duly served on each of the present Defendants herein on Dec. 19, 1988. So affirmed.

Philip E.
Foster, Esq.

[stamped]
FILED
DEC 23 1988
AT 8:30 .....
WILLIAM T.
WALSH
CLERK
(slw)

Exhibit 3

PS Form 3800, June 1985

P 826 696 977

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to (Pres, AAUP)

Street and No (1012 14th St Wash DC)

P.O. State and Zip Code

Postage $(65)

Certified Fee (85)

Special Delivery Fee

Restricted Delivery Fee

Return Receipt showing

to whom and Date Delivered (90)

Return Receipt showing to whom,

Date and Address of Delivery

TOTAL Postage and Fee $(2.40)

[stamped] NEW YORK [illegible]

DEC 19 1988

PS Form 3800, June 1985

P 826 696 979

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to (Judy Green, Pres.)

Street and No (Bldg 4103 Kilmer)

P.O. State and Zip Code New Brunswick NJ)

Postage $(85)

Certified Fee (85)

Special Delivery Fee

Restricted Delivery Fee

Return Receipt showing

to whom and Date Delivered (90)

Return Receipt showing to whom,

Date and Address of Delivery

TOTAL Postage and Fee $(2.60)

[stamped] NEW YORK [illegible]
DEC 19 1988

PS Form 3800, June 1985

P 826 696 984

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to David Scott, Univ Consl)

Street and No (105 Geology Hall, Rutgers)

P.O. State and Zip Code (New Brunswick NJ)

Postage $ (85)

Certified Fee (85))

Special Delivery Fee

Restricted Delivery Fee

Return Receipt showing
to whom and Date Delivered (90)

Return Receipt showing to whom,
Date and Address of Delivery

TOTAL Postage and Fee $(2.60)

[stamped] NEW YORK (illegible)
DEC 19 1988

Exhibit N

SENDER: Complete items 1 and 2 when additional services are desired and complete items 3 and 4. Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address.
2. Restricted Delivery (Extra charge)
3. Article Addressed to:

(David Scott, Univ. Consel
Rm 105, Geology Hall
Rutgers Univ.
New Brunswick NJ)

4.Article Number (P 826 696 984)

Type of Service

Registered Insured

(X)Certified COD

Express Mail

Always obtain signature of addressee or agent and

DATE DELIVERED.

5. Signature - Addressee

X

6. Signature - Agent

X (R)

7. Date of Delivery

[stamped] Dec 21 1988

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Mar. 1987 * U.S.G.P.O. 1987-178-268

DOMESTIC RETURN RECEIPT

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS [stamped] ALWAYS USE YOUR ZIP CODE

[(stamped] (illegible) PM Dec 21 1988 08899

KILMER GMF NJ

U.S. Mail Penalty for Private Use, $300

SENDER INSTRUCTIONS

Print your name, address, and Zip code in the space below.

- Complete items 1,2,3, and 4 on the reverse.
- Attach to front of article if space permits otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

RETURN TO Print Sender's name, address, and ZIP Code in the space below.

(P. Foster

23 E 81

NYC 10028)

Exhibit P

SENDER: Complete items l and 2 when additional services are desired and complete items 3 and 4.
Put your address in the " RETURN TO " Space on the reverse side. Failure to do so will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery.For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

l. Show to whom delivered , date, and addressee's address.

2. Restricted Delivery (Extra charge)

3. Article Addressed to:

(Judy Green, Pres.
Rutgers Council
Bldg. 45103 - Kilmer
Rutgers Univ.
New Brunswick NJ)

4. Article No. (P 826 696 979)

Type of Service

Registered Insured

(x) Certified COD

Express Mail

Always Obtāin Signature of addressee or agent and

DATE DELIVERED.

5. Signature - Addressee

X

6. Signature - Agent

X (R)

7. Date for Delivery

[stamped] DEC 21 1988

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Mar. 1987 *U.S.G.P.O. 1987-178-268

DOMESTIC RETURN RECEIPT

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS [stamped]ALWAYS USE YOUR ZIP CODE

[stamped] PM DEC 21 1988 KILMER GMP NJ

[illegible]

U.S. Mail Penalty for Private Use, $300

SENDER INSTRUCTIONS

Print your name, address, and Zip code in the space below.

-Complete items 1,2,3 and 4 on reverse.

-Attach to front of article if space permits otherwise affix to back of article.

-Endorse article " Return Receipt Requested" adjacent to number.

RETURN TO Print Sender's name, address, and ZIP Code in the space below.

(p. Foster
23 E 8l
NYC 10028)

Exhibit Q

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Philip E. Foster, Plaintiff

-against-

Rutgers, The State University et.al., Defendants

NOTICE AND ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT

88Civ.3692(HLS)

Docket Number and Judge's Initials

To [insert name and address of party to be served]

(David R. Scott, Univ. Counsel

for Rutgers, The State Univ.)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

University Counsel/Service accepted on behalf of

Rutgers, The State University [illegible]

Relationship to Entity/Authority to Receive Service of Process

SDNY Form 18-A (rec. 8/85)-

Exhibit 4

CARPENTER, BENNET & MORRISEY
Three Gateway Center
100 Mulberry Street
Newark, NJ 07102
(201) 622-7711
Attorneys for Defendant
Rutgers, The State University

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Philip E. Foster,
Plaintiff
v.
Rutgers, The State University; The Rutgers Council of the American: Association of University Professors; The Permanent Panel on Procedures; and the American Association

: HONORABLE H. LEE SAROKIN

AFFIDAVIT OF DAVID R. SCOTT IN SUPPORT OF

of University Professors, Joint and Several Defendants.	DEFENDANT RUTGERS, THE STATE UNIVERSITY'S MOTION TO DISMISS COMPLAINT

STATE OF NEW JERSEY :

COUNTY OF MIDDLESEX: SS.:

David R. Scott, of full age , being duly sworn according to law, upon his oath deposes and says:

1. I am employed byRutgers, The State University of New Jersey ("Rutgers"), in the position of University Counsel.

2. I make this affidavit in support of Rutgers' motion to dismiss the Complaint.

3. A letter by plaintiff, Philip E. Foster, dated September 10, 1988 and received by me on September 14, 1988, was referred to me for response. A true copy of said letter is attached hereto as EXHIBIT 1.

Therein, plaintiff Foster asked if Rutgers would accept service by mail of a summons and complaint in an action identified only as " Foster v. Rutgers, et al. "

4. By my letter dated September 16, 1988, I advised plaintiff Foster: " Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under those rules ." A true copy of said letter is attached hereto as EXHIBIT 2.

5. Plaintiff Foster did not mail the Summons and Complaint to Rutgers until late December, 1988, immediately prior to the time period during which both the academic and administrative offices of Rutgers are closed for the holidays.

6. I have reviewed a copy of the " Affirmation of Service " which the plaintiff filed with the Clerk of this Court on December 23, 1988. A copy thereof is attached hereto as EXHIBIT 3. Contrary to plaintiff Foster's affirmation, the Summons and Complaint were not served upon Rutgers on December 19, 1988.

7. On December 23, 1988, on behalf of Rutgers, I signed the " Notice and Acknowledgement of Receipt of Summons and Complaint " form which had been enclosed with the Summons and Complaint mailed to Rutgers. A true copy thereof is attached hereto as EXHIBIT 4.

(David R. Scott)

DAVID R. SCOTT

Sworn and Subscribed to
before me this (6th) day
of January , 1989.

(Maria E. DiPina)

MARIA E. DePINA

NOTARY PUBLIC OF NEW JERSEY

My Commission expires Aug. 30,1990

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Philip E. Foster, CIVIL ACTION NO.

plaintiff ACKNOWLEDGEM

ENT

vs. OF SERVICE

Rutgers, The State

University Et al.,

Joint and

Several Defendants

The undersigned hereby acknowledges receipt of a copy of the summons and complaint in the above-captioned matter on February ,1989 on behalf of

So acknowledged.

(Sign.) (Gail B. Heseltine)

(Print) (GAIL B. HESELTINE)

(for David R. Scott)

Dated: February (10), 1989

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Philip E. Foster, plaintiff

vs.

ENT

Rutgers, The State University, et al.,

Joint and Several Defendants

CIVIL ACTION NO. 88-3692 (HLS)

ACKNOWLEDGEM

OF SERVICE

The undersigned hereby acknowledges receipt of a copy of the summons and complaint in the above-captioned matter on February (10), 1989 on behalf of (Rutgers Council of AAUP Chapters)

So acknowledged.

(Sign) (Judy Green)

(Print) (JUDY GREEN)

Dated: February (10), 1989

Philip E. Foster
Petitioner Pro Se
23 East 81st Street
New York, N.Y. 10028
(212) 988-3306